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No. 98- ----

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AT&T WIRELESS SERVICES and MCCAW CELLULAR COMMUNICATIONS, INC.,

Petitioners,

v.

CORYELLE TENORE, CHARLES F. PETERSON and KAREN M. COLE, on behalf of themselves and all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the Washington Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the express preemption provision of 47 U.S.C. § 332(c)(3)(A) -- which prohibits regulation by States of "the rates charged" by mobile telephone service providers -- nevertheless permits plaintiffs across the country to seek rate refunds through damages awards premised on violations of state statutory and common law.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner AT&T Wireless Services, Inc. declares that it is wholly owned by AT&T Corp., a New York corporation. Petitioner AT&T Wireless Services, Inc. has no publicly traded, nonwholly owned subsidiaries.

Petitioner McCaw Cellular Communications, Inc., merged into a subsidiary of AT&T Corp., and later changed its name to Petitioner AT&T Wireless Services, Inc. Petitioner McCaw Cellular Communications, Inc. no longer exists as a separate entity.

AT&T Corp. has an equity or debt interest in the following publicly traded companies:

AT&T Credit Holdings, Inc.;

American Mobile Satellite Corporation;

Lanser Wireless Inc. (Canada); and

Teleport Communications Group Inc.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Statutory and Regulatory Background 3

B. The Proceedings Before the Trial Court 6

C. The Washington Supreme Court's Decision 10

REASONS FOR GRANTING THE PETITION 12

THE WASHINGTON SUPREME COURT'S DECISION CONTRAVENES THE INTENT OF CONGRESS AND, IF UNCORRECTED, WILL HAVE A PROFOUND, ADVERSE IMPACT ON THE WIRELESS INDUSTRY 14

A. There Is A Patchwork Of Conflicting And Confusing Decisions Interpreting Section 332 .. 15

B. The Washington Supreme Court's Decision Provides An Ideal Vehicle For This Court To Resolve The Conflicts Regarding The Preemptive Scope Of Section 332 19

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

AT&T Co. v. *Central Office Tel., Inc.*,
118 S. Ct. 1956 (1998) 6,19,20

Alicke v. *MCI Communications Corp.*,
111 F.3d 909 (D.C. Cir. 1997) 7

American Airlines, Inc. v. *Wolens*,
513 U.S. 219 (1995) 12,23,24

Arkansas La. Gas Co. v. *Hall*,
453 U.S. 571 (1981) 22

Ball v. *GTE Mobilnet, Ltd.*,
No. 98AS03811 (Cal. Super. Ct. (Sacramento County) Nov. 17, 1998) 15

Bishop v. *Provident Life and Casualty Ins. Co.*,
749 F. Supp. 176 (E.D. Tenn. 1990) 21

Carroll v. *Cellco Partnership*,
Docket Nos. AM-001316-96T3, AM-001303-96T3 (N.J. Super. Ct. App. Div., June 25, 1997) 9,16

Cipollone v. *Liggett Group, Inc.*,
505 U.S. 504 (1992) 23,24

In re Comcast Cellular Telecomm. Litig.,
949 F. Supp. 1193 (E.D. Pa. 1996) 16

Cox Broadcasting Corp. v. *Cohn*,
420 U.S. 469 (1975) 12

DeCastro v. *AWACS, Inc.*,
935 F. Supp. 541 (D.N.J.), *appeal dismissed*, 940 F. Supp. 692 (D.N.J. 1996) 9

Fax Telecommunicaciones v. *AT&T Co.*,
952 F. Supp. 946 (E.D.N.Y. 1996) 22

Gade v. *National Solid Wastes Management Ass'n*,
505 U.S. 88 (1992) 23

Goodyear Atomic Corp. v. *Miller*,
486 U.S. 174 (1988) 12

Hardy v. *Claircom Communications Group, Inc.*,
937 P.2d 1128 (Wash. App. 1997) 8,10

Iowa Utils. Bd. v. *FCC*,
120 F.3d 753 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 879 (1998) 18

Keogh v. *Chicago & Northwestern Ry. Co.*,
260 U.S. 156 (1922) 8

Lee v. *Contel Cellular of the South, Inc.*,
1996 U.S. Dist. LEXIS 19636 (S.D. Ala. 1996) 16

Marcus v. *AT&T Corp.*,
938 F. Supp. 1158 (S.D.N.Y. 1996), *aff'd*, 138 F.3d 46 (2d Cir. 1998) 21

Medtronic, Inc. v. *Lohr*,
518 U.S. 470 (1996) 21,22,23

Metro Mobile Cts, Inc. v. *Dep't of Pub. Util. Control*,
Nos. CV-95-00512755, CV-95-05500965, 1996 WL 737480
(Conn. Super. Ct. Dec. 11, 1996) 18

Mississippi Power & Light Co. v. *Mississippi ex rel. Moore*,
487 U.S. 354 (1988) 12

Morales v. *Trans World Airlines, Inc.*,
504 U.S. 374 (1992) 23

Nader v. *Allegheny Airlines*,
426 U.S. 290 (1976) 11

Penrod v. *Southwestern Bell Mobile Sys.*,
No. 96-L-132 (Ill. Cir. Ct. (Madison County)) 18

Powers v. *AirTouch Cellular*,
No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6,
1997) 15,21,22,24

Rice v. *Santa Fe Elevator Corp.*,
331 U.S. 218 (1947) 23

Rogers v. *Westel-Indianapolis Co.*,
No. 49D03-9602-CP-0295 (Marion Super. Ct. (Ind.) July 1,
1996) 15

San Diego Building Trades Council v. *Garmon*,
359 U.S. 236 (1959) 21

Sanderson v. *AWACS, Inc.*,
958 F. Supp. 947 (D. Del. 1997) 16

Simons v. *GTE Mobilnet, Inc.*,
No. H-95-5169 (S.D. Tex. Apr. 11, 1996) . . 15,21,22,24

Storer Cable Communications v. *City of Montgomery*,
806 F. Supp. 1518 (M.D. Ala. 1992) 21

Tenore v. *AT&T Wireless Servs.*,
962 P.2d 104 (1998) 1,9

Wegoland, Ltd. v. *NYNEX Corp.*,
806 F. Supp. 1112 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 17 (2d Cir. 1994) 22

CONSTITUTION AND STATUTES

U.S. Const. art. VI, cl. 2 2

Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 6002(b), 107 Stat. 312, *codified in* 47 U.S.C. . 2,5

47 U.S.C. § 254 17

47 U.S.C. § 332(c)(3)(A) (1994) . . . . . *passim*

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H.R. Rep. No. 103-111, (1993), *reprinted in* 1993 U.S.C.C.A.N. 378 4

ADMINISTRATIVE DECISIONS AND AUTHORITIES

California Wireless Resellers Ass'n v. *Los Angeles Cellular Tel. Co.*,
No. 98-06-055 (CPUC Nov. 5, 1998) 17

Competitive Market Conditions with Respect to Commercial Mobile Servs.,
10 F.C.C.R. 8844 (1995) 10,20

Equal Access,
9 F.C.C.R. 5408 (1994) 3

Federal-State Joint Board on Universal Serv.,
12 F.C.C.R. 8776 (1997) 17,18

Implementation of Sections 3(n) and 332 of the Communications Act,
9 F.C.C.R. 1411 (1994) 11,16

Nova Cellular West, Inc. v. *Air Touch Cellular*,
No. 98-02-036 (CPUC Sept. 3, 1998) 17,21

Regulatory Control of the Rates of Wholesale Cellular Service Providers,
10 F.C.C.R. 7025 (1995) 6

State of California Regulatory Authority Over Intrastate Cellular Service Rates,
10 F.C.C.R. 7486 (1995) 5,14

Truth-in-Billing and Billing Format,
1998 FCC LEXIS 4849 (Sept. 17, 1998) 18

Westside Cellular, Inc. v. *GTE Mobilnet, Inc.*,
1995 Ohio PUC LEXIS 240 (Mar. 23, 1995) 17

FCC Pub. Notice, DA-97-2464 (Nov. 24, 1997) 18

FCC Pub. Notice, DA-98-945, F.C.C. LEXIS 2332 (May 18, 1998) 18

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John W. Berresford, *Mergers in Mobile Telecommunications Services: A Primer on the Analysis of Their Competitive Effects*, 48 Fed. Com. L.J. 247 (1995) 4

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U.S. Dep't of Commerce, *U.S. Industrial Handbook, Forecasts For Selected Manufacturing and Service Industries* (Jan., 1994) 4

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PETITION FOR WRIT OF CERTIORARI

Petitioners AT&T Wireless Services, Inc. and McCaw Cellular Communications, Inc. (jointly, "AT&T Wireless"), respectfully request that a writ of certiorari issue to review the judgment of the Washington Supreme Court.

OPINIONS BELOW

The *en banc* decision of the Washington Supreme Court is reported at 136 Wash.2d 322, 962 P.2d 104 (1998) (Appendix to Petition for Certiorari ("App.") 1a-32a). The order of the

Superior Court of Washington for King County dismissing plaintiffs' claims is not reported (App. 33a-34a).

JURISDICTION

The judgment of the Washington Supreme Court was entered on September 10, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision in this case is the Supremacy Clause in Article VI of the United States Constitution, which provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .

U.S. Const. art. VI, cl. 2.

The statutory provision involved in this case is 47 U.S.C. § 332(c)(3)(A) (1994), which provides, in pertinent part:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

STATEMENT OF THE CASE

In 1993, Congress amended the Communications Act of 1934 ("Communications Act") to alter fundamentally the statutory system regulating wireless telecommunications services ("wireless services") in an effort to foster that industry's continued growth and development. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66,

6002(b), 107 Stat. 312, 392-93 (codified in scattered sections of 47 U.S.C.). Recognizing that wireless services "by their nature, operate without regard to state lines," Congress sought to ensure uniform regulation for these services by divesting States of "any authority to regulate . . . rates charged" by wireless telephone providers. 47 U.S.C. § 332(c)(3)(A) (1994) ("Section 332").[1]

In a decision flatly contrary to Congress' express efforts to prohibit state regulation of wireless rates, the Washington Supreme Court held that state common law and statutory actions seeking refund damages could proceed even if the award of damages in those cases will require courts retroactively to adjust wireless rates on a class-wide basis. The court's misguided decision subverts Congress' intent in an area of critical importance to the national telecommunications infrastructure. If not corrected, the holding below imperils the continued growth and development of wireless communications services that benefit citizens nationwide. Moreover, the Washington Supreme Court's decision deepens the already growing conflict among state and federal courts and administrative agencies regarding the preemptive reach of Section 332 and the proper legal analysis for deciding whether an action for monetary damages constitutes state rate regulation that is expressly preempted by federal law.

A. Statutory And Regulatory Background.

Since its inception in the early 1980's, the cellular (or more broadly, the "wireless") telephone industry has developed at an

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[1] "Commercial mobile radio service" is defined to include the cellular service provided by AT&T Wireless. The phrase includes all mobile forms of wireless communications, including cellular, personal communications service, and airplane telephone service. *Equal Access*, 9 F.C.C.R. 5408, 5416-17 (1994).

astounding rate. In just over a decade, the number of cellular telephone subscribers in the United States increased from fewer than a 100 thousand subscribers in 1984 to more than 24 million in 1995.[2] Annualized figures for 1998 indicate that the U.S. cellular industry employs more than 113,000 individuals and serves in excess of 60 million subscribers.[3] As a result of this massive and sustained growth, wireless telephone services comprise an "integral part of the national telecommunications infrastructure." H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

Cellular or wireless telephone service differs substantially from traditional home or office telephone service because wireless service operates largely without regard to state lines. Cellular service areas frequently include portions of multiple states. Further, because wireless telephones are portable, they routinely are used in more than one state. Indeed, a wireless call may originate in one state, the caller may drive into a second state, and the call may be routed and switched to its final destination via a third state. See Leonard J. Kennedy & Heather A. Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong,"* 50 Fed. Com. L.J. 547, 550 (1998).

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[2] *See* Alfred Lee, *Land Mobile Radio Services*, in *NTIA Telecom 2000, Charting the Course for a New Century*, 286 & Table 1 (1988); U.S. Dept. of Commerce, *U.S. Industrial Handbook, Forecasts For Selected Manufacturing and Service Industries* 30-6 (Jan. 1994); *see also* John W. Berresford, *Mergers in Mobile Telecommunications Services: A Primer on the Analysis of Their Competitive Effects*, 48 Fed. Com. L.J. 247, 256 (1995).

[3] *See* Cellular Telecomm. Indus. Ass'n, *Annualized Wireless Industry Data Survey Results, June 1985 to June 1998* (1998) ‹http://www.wow-com.com/professional/reference/datasurvey/view_98datasurvey2.gif› (hereafter, "*CTIA's Annualized Survey*").

Cognizant both of the sustained growth and interstate character of wireless telephone services, in 1993, Congress amended the Communications Act to alter fundamentally the statutory structure governing wireless services in an effort to eliminate unnecessary and conflicting regulatory barriers and to foster continued growth and development. This new legislation responded to calls for measures that would encourage further investment in wireless infrastructure. H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

Essential to this new statutory regime was Congress' command, reflected in Section 332, that "no state or local government shall have authority to regulate 'the entry or the rates charged'" for wireless telephone service. See *State of California Regulatory Authority Over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486, 7487 (1995) (quoting 47 U.S.C. § 332(c)(3)(A)). As explained by the FCC, Section 332 was critical because Congress sought "to establish a *national* regulatory policy for [wireless communications], not a policy that is balkanized state-by-state." *Id.* at 7499.[4] Put another way, preemption of state rate regulation plays a critical role in Congress' statutory scheme because it provides for a uniform, stable and predictable regulatory environment:

> Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal.

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[4] President Clinton lauded the legislation overhauling the wireless regulatory regime because it "'creates the infrastructure to develop the most advanced commercial wireless communication networks the world has ever known [and will] allow an industry to grow by tens of billions of dollars by the end of the decade, producing hundreds of thousands of new high-skilled, high-wage jobs.'" Kennedy & Purcell, 50 Fed. Com. L.J. at 549-50 (quoting President Clinton, Remarks at a Communications Technology Demonstration (July 22, 1993)).

> Thus, in implementing the statute, we have attempted to facilitate the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment -- rather than burdening entrepreneurial activities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.

Regulatory Control of the Rates of Wholesale Cellular Service Providers, 10 F.C.C.R. 7025, 7031-32 (1995) (footnotes omitted). The only regulatory authority left to the States was regulation of "terms and conditions" of wireless service other than "rates." 47 U.S.C. § 332(c)(3)(A) (1994).[5] This legislative overhaul has produced enormous public benefits; since 1993, for example, the wireless industry has attracted almost $40 billion in additional capital investments. See *CTIA 's Annualized Survey supra* note 3.

B. The Proceedings Before The Trial Court.

AT&T Wireless has direct and indirect ownership interests in wireless license holders that provide wireless telephone service to more than 9 million subscribers in all 50 states. AT&T Wireless offers its customers many different rate plan options, including a number of nationwide discounted calling plans. Virtually all of AT&T Wireless' rate plans, like those of most competing wireless providers, include a per-minute charge for airtime use. And, like other wireless (and long-distance) carriers, AT&T Wireless follows the long-standing, industry-

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[5] As this Court has recognized, however, "[r]ates . . . do not exist in isolation" and "have meaning only when one knows the services to which they are attached." *AT&T Co.* v. *Central Office Tel., Inc.*, 118 S. Ct. 1956, 1963 (1998). As a result, this Court warned that lower courts must be cognizant that a claim for "excessive rates can be couched as a claim for inadequate services and vice versa." *Id.*

wide practice of "rounding up," *i.e.*, charging customers for telephone services based on the length of the telephone call using full-minute increments.[6] Put another way, customers are charged for a full minute when they make a wireless call that lasts only part of a minute.

On October 24, 1995, Plaintiffs-Respondents Coryelle Tenore, Charles F. Peterson and Karen M. Cole ("Respondents") filed a class-action lawsuit against AT&T Wireless, raising state law claims for breach of contract, misrepresentation, fraud, and violations of the Washington Consumer Protection Act. App. 4a. Respondents' claims are based on allegations that AT&T Wireless did not adequately disclose its practice of charging customers in full-minute increments. App. 3a. Respondents' Second Amended Complaint includes a putative "regionwide" class of all AT&T Wireless customers in Washington, Oregon, Alaska, Idaho and Utah who "have been subject to having their airtime charges rounded up to the next full minute." App. 39a.

Although Respondents disclaim any effort to "change, diminish, or modify the rates being charged by [AT&T Wireless]," App. 37a, the relief they seek, if permitted, would do precisely that. Indeed, in their complaint, Respondents expressly ask for "compensatory damages in the form of a refund of the difference between the amounts charged by [AT&T Wireless] and the amount, if any, which cellular users would have incurred if [AT&T Wireless] did not engage in this

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[6] Charging customers in full-minute increments is a standard practice among providers of long distance, cellular, airplane telephone, and other telecommunications services. Indeed, as the Washington Supreme Court noted, "[l]ong distance carriers have historically used full-minute billing." App.3a n.6; *see also Alicke* v. *MCI Communications Corp.*, 111 F.3d 909, 912 (D.C. Cir. 1997) (noting that, until recently, "long distance service has always been listed and billed" in "whole-minute increments").

practice." *Id.*[7] Thus, the relief sought by Respondents requires the court to impose both a billing increment other than the full-minute system used by AT&T Wireless and a corresponding "rate" applicable to that new increment. As a result, the effect of the relief sought by Respondents would be to require wireless providers retroactively to charge their customers different rates depending on the vagaries of law of individual states.[8]

Respondents' lawsuit is but one in a series of such lawsuits filed across the country against virtually every service provider in the wireless industry attacking how wireless calls are charged. Since 1995, more than 45 of these cases have been filed against wireless carriers throughout the country. App. 52a-57a (listing cases filed against wireless and long-distance carriers since 1995). All told, the potential damages sought in these lawsuits amount to many hundreds of millions of dollars. Indeed, in this case alone, Respondents claim that AT&T Wireless' practice of charging its customers in full-minute increments "result[ed] in

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[7] Respondents also seek an injunction preventing AT&T Wireless from charging customers based upon the practice of "rounding up *without disclosing the practice*." App. 37a (emphasis added). That request for injunctive relief is particularly peculiar because Respondents have no need for such future disclosures given that they admittedly are aware that AT&T Wireless bases its wireless telephone rates on the practice of rounding each telephone call to a full-minute increment. App. 36a. In any event, such claims for future disclosures are moot because, as explained in a separate case, "AT&T Wireless's promotional materials now explain the practice of rounding up in connection with billing for calls." *Hardy* v. *Claircom Communications Group, Inc.*, 937 P.2d 1128, 1132 n.3 (Wash. App. 1997).

[8] *Cf. Keogh* v. *Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 163 (1922) (rejecting claim for damages based on allegations of payment "of a rate higher than that which would have otherwise prevailed" because "the amount recovered might, like a rebate, operate to give [the plaintiff] a preference" over other customers).

millions of dollars of excess billing by [AT&T Wireless]." App. 36a.

The monetary relief being sought in these cases -- widespread refunds for millions of customers -- necessarily will require triers of fact retroactively to adjust wireless rates. Indeed, these class action lawsuits propose to resolve claims on a statewide, regionwide, even nationwide basis going back as many as six years.[9] In other words, plaintiffs across the country are asking courts to apply state law to regulate rates, not just for one or two customers, and not just for a single carrier's entire customer base, but for virtually the entire wireless industry.

On April 29, 1997, AT&T Wireless filed a motion to dismiss Respondents' claims because, among other things, they were preempted by federal law. App. 4a. In support of its motion, AT&T Wireless demonstrated that an award of refund damages based on a new billing increment would amount to state rate regulation in violation of Section 332. Respondents claimed that Section 332 does not preempt their claims because they challenge only the adequacy of AT&T Wireless' disclosures concerning its practice charging customers in full-minute increments. App. 6a.

In reply, AT&T Wireless explained that Section 332 preempts state law claims -- even failure-to-disclose claims -- when, as here, an award of damages would result in the regulation of wireless telephone rates. That is, an award of refund damages in this case would result in rate regulation

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[9] *See, e.g., Tenore* v. *AT&T Wireless Servs., Inc.*, 962 P.2d 104, 105-06 (Wash. 1998) (regionwide class); *DeCastro* v. *AWACS, Inc.*, 935 F. Supp. 541, *appeal dismissed*, 940 F. Supp. 692 (D.N.J. 1996) (statewide class); *Carroll* v. *Cellco Partnership*, Docket Nos. AM-001316-96T3, AM-001303-96T3 (N.J. Super. Ct. App. Div., June 25, 1997) (nationwide case).

because the court retroactively must determine what AT&T Wireless may charge based on a different billing increment than the full-minute rate charged by AT&T Wireless. However labeled, the clear and direct effect of the relief Respondents seek would be to regulate AT&T Wireless' rates under state statutory and common law standards. See *Competitive Market Conditions with Respect to Commercial Mobile Servs.*, 10 F.C.C.R. 8844, 8868 (1995) (billing increment is a necessary component of wireless rates).[10]

While AT&T Wireless' Motion to Dismiss was pending, the Washington State Court of Appeals held that a virtually identical full-minute billing claim was preempted by Section 332. *Hardy* v. *Claircom Communications Group*, 937 P.2d 1128 (Wash. App. 1997).[11] The trial court in the present case agreed with the *Hardy* Court's analysis, concluded that *Hardy* also controlled the present case, and dismissed Respondents' claims because they too were preempted by Section 332. App. 33a-34a.

C. The Washington Supreme Court's Decision.

Respondents appealed the trial court's decision directly to the Washington Supreme Court, arguing that their claims were not preempted and that the *Hardy* decision should not control.

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[10] *See also Black's Law Dictionary* 1261 (6th ed. 1990) (defining "rate" as "a charge, valuation, payment or price fixed according to ratio, scale or standard").

[11] The plaintiff in *Hardy* asserted the same claims against Claircom Communications Group, a division of AT&T Wireless that provides airplane telephone service for airline passengers. *Id.* at 1130. The *Hardy* Court held that Section 332 preempted those claims because an award of refund damages would require the court to engage in precisely the sort of rate regulation that Congress prohibited. *Id.* at 1133.

On September 10, 1998, the Washington Supreme Court reversed the trial court's decision, holding that Respondents' misrepresentation, fraud, and consumer protection act claims were not preempted by Section 332. App. 31a-32a.[12] After canvassing the many conflicting decisions relied upon by Respondents and AT&T Wireless, App. 17a-23a, the lower court ultimately relied upon *Nader* v. *Allegheny Airlines*, 426 U.S. 290 (1976) -- a decision which, unlike this case, involved (1) a statutory scheme that lacked any express preemption provision, *id.* at 301, and (2) a challenge to a practice for which the federal agency charged by Congress with regulatory authority over the practice expressly permitted individuals to advance state common-law claims, *id.* at 306 -- to hold that there was "sufficient reliable authority . . . to conclude that the state law claims brought by Appellants and the damages they seek do not implicate rate regulation prohibited by Section 332." App. 25a.

In essence, the court ruled that Section 332 did not preempt Respondents' state law claims because there were no filed tariffs:

> [A] challenge to a practice that is not governed by a tariff filing does not implicate the "conflict" inherent in contesting a . . . rate expressly regulated by an agency and . . . any impact on rates is "merely incidental."

App. 31a.[13] As a result, the Washington Supreme Court held that "the State law claims brought by [Respondents] and the

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[12] Respondents did not appeal the dismissal of the breach of contract claims. App. 4a n.13.

[13] In fact, the FCC continues to regulate wireless rates in the absence of filed tariffs under 47 U.S.C. § 201(b) (1994). *See Implementation of Sections 3(n) and 332 of the Communications Act*, 9 F.C.C.R. 1411, 1479 (1994).

damages they seek do not implicate rate regulation prohibited by Section 332." App. 25a.[14]

REASONS FOR GRANTING THE PETITION

Review of the Washington Supreme Court's decision is urgently needed. Despite Congress' clear statement in Section 332 that States cannot regulate wireless rates, the Washington Supreme Court has allowed state law claims for refund damages that will require state courts to engage in prohibited rate regulation. As a result, the Washington Supreme Court's decision thwarts Congress' intent to remove States from the rate regulation arena and to free wireless providers from conflicting state rate regulations that will otherwise threaten the development of an integral part of the

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[14] The *Tenore* court expressly refrained from addressing the ultimate merits of Respondents' state law claims. App. 26a n.108. Although the Washington Supreme Court envisioned further proceedings before the trial court, its decision falls comfortably within the jurisdiction of this Court. *See, e.g., Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-83 (1975). Here, the Washington Supreme Court squarely confronted and decided the issue of federal preemption under Section 332; reversal of the *Tenore* decision will preclude further litigation in this case; and without immediate review the Washington Supreme Court's decision "might seriously erode federal policy" pertaining to the uniform federal system of regulation of a fast-growing and critical component of the national telecommunications infrastructure. *See id.*; *see also Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 370 n.11 (1988) (holding that state-court judgment ripe for review despite fact that "further proceedings will be held on remand" because "[t]he critical federal question -- whether federal law preempts such proceedings . . . already [has] been answered by the State Supreme Court"); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180 (1988) (holding that State Supreme Court's rejection of federal preemption claim was "a final judgment for purposes of 28 U.S.C. § 1257(2)"); *cf. American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 225-26 (1995) (reviewing, on the merits, Illinois Supreme Court's denial of a motion to dismiss state law claims of breach of contract and Illinois' Consumer Fraud and Deceptive Business Practices Act based on federal preemption).

national telecommunications infrastructure. Indeed, the decision below gives courts *carte blanche* to apply state law retroactively to adjust rates for wireless carriers through damage awards.

In doing so, the Washington Supreme Court's decision undermines a core federal policy that Congress had hoped to further by enacting Section 332 -- providing regulatory uniformity and stability for the wireless telephone industry. Indeed, rather than uniformity and stability, the Washington Supreme Court's decision promises increased regulatory uncertainty. The impact of this case is magnified because scores of similar class action lawsuits are pending against virtually every major wireless carrier in the country. The Washington Supreme Court's decision highlights and adds to the already widespread conflict and confusion among state and federal courts and agencies.

Finally, the Washington Supreme Court's decision conflicts with this Court's most recent opinion on the meaning of rates under the Communications Act; decisions from this Court establishing that awards of refund damages constitute rate regulation; and decisions by this Court establishing the standards for deciding the scope of express preemption provisions.

THE WASHINGTON SUPREME COURT'S DECISION CONTRAVENES THE INTENT OF CONGRESS AND, IF UNCORRECTED, WILL HAVE A PROFOUND, ADVERSE IMPACT ON THE WIRELESS INDUSTRY.

Virtually every major wireless carrier in the country has been the target of class action lawsuits attacking how their calls are charged. Although many of these cases are disguised as "disclosure" claims, they all assert that customers have been overcharged and seek damages in the form of retroactive refunds. In a very practical way, then, Congress' statutory structure governing an important component of the national telecommunications industry has been imperiled.

Section 332 defines the balance of power between the state and federal governments over the regulation of the wireless industry and reflects Congress' determination that federal law should preempt all state regulation of rates charged by wireless carriers:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3)(A) (1994). As demonstrated above, see *supra* 3-6, Section 332 was considered necessary by Congress and the FCC to ensure a predictable and uniform regulatory policy for wireless rates by eliminating state-by-state determinations of what and how rates should be charged for services that routinely cross state boundaries and are otherwise regional or national in scope. See *State of California Regulatory Authority Over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486, 7499 (1995) (explaining that Congress intended that Section 332 would "establish a *national*

regulatory policy for [wireless services], not a policy that is balkanized state-by-state") (footnote omitted). Congress' goals of ensuring "regulatory symmetry" and providing a "stable and predictable" regulatory environment for wireless carriers are threatened by conflicting decisions in the federal and state courts interpreting the proper scope of Section 332.

A. There Is A Patchwork Of Conflicting And Confusing Decisions Interpreting Section 332.

The Washington Supreme Court's decision starkly illustrates the confusion in state and federal courts and state and federal regulatory agencies over the meaning and scope of Section 332.

1. Quite literally, state and federal decisions involving Section 332 preemption are all over the map. For example, at least one court has concluded that *all* state law claims having an impact on wireless rates are preempted by Section 332. See *Simons* v. *GTE Mobilnet, Inc.*, No. H-95-5169 (S.D. Tex. Apr. 11, 1996) ("[A]ll state law claims related to the field of rate regulation are completely preempted by section 332(c)(3)(A)") (App. 62a). A number of other courts have ruled that Section 332 preempts state law claims challenging the reasonableness of wireless billing practices. See, *e.g.*, *Ball* v. *GTE Mobilnet of California, Ltd.*, No. 98AS03811 (Cal. Super. Ct. (Sacramento County) Nov. 17, 1998) (dismissing "rounding up" and related claims under Section 332 because they challenged the method of calculating the length and rate for wireless service) (App. 63a-64a). Several courts have ruled that even "disclosure" claims are preempted, if the request for damages requires courts retroactively to adjust rates. See, *e.g.*, *Rogers* v. *Westel-Indianapolis Co.*, No. 49D03-9602-CP-0295 (Marion Super. Ct. (Ind.) July 1, 1996) (App. 65a-66a); *Powers* v. *AirTouch Cellular*, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997) (App. 68a-69a). In

contrast, at least one court has refused to preempt any disclosure claims, regardless of the damages sought and regardless of how directly the claims challenged wireless rates. See *Carroll* v. *Cellco Partnership*, Docket Nos. AM-001316-96T3 and AM-001303-96T3 (N.J. Super. Ct., App. Div., June 25, 1997) (App. 70a-71a).[15]

The FCC's decision, based on legislative authority, to lift the filed tariff requirement for wireless carriers has resulted in much of the confusion among the lower courts. See *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 F.C.C.R. at 1479 (citing 47 U.S.C. § 332(c)(1)(C)). Although the FCC's ruling was meant to ease the regulation of wireless services and to provide an opportunity for market forces to set rates in this vigorously competitive industry, ironically, courts have interpreted the absence of a filed tariff requirement as a basis for concluding that state law regulation in the form of rate refund damages claims survive despite the express preemption provision of Section 332. In essence, many courts have unduly limited the preemptive reach of Section 332 by reasoning that, because the challenged rates were not subject to filed tariffs, retroactive state law adjustments to those rates and rate structures are not preempted at all. See, *e.g.*, App. 25a.

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[15] Courts applying the doctrine of "complete preemption" have likewise disagreed about whether the preemptive force of the Communications Act, including Section 332, is sufficiently strong to support removal of state law claims to federal court. *See, e.g., Lee* v. *Contel Cellular of the South, Inc.*, 1996 U.S. Dist. LEXIS 19636, at *9, *13-*14 (S.D. Ala. 1996) (holding that contract claims completely preempted by Section 332; tort claims not completely preempted); *In re Comcast Cellular Telecomm. Litig.*, 949 F. Supp. 1193, 1205-06 (E.D. Pa. 1996) (holding that, under the artful pleading doctrine, contract and statutory claims were not removable to federal court, but tort claims were removable); *Sanderson* v. *AWACS, Inc.*, 958 F. Supp. 947, 956-58 (D. Del. 1997) (no claims were completely preempted).

2. State regulatory agencies likewise disagree over the scope of Section 332. For example, California's Public Utilities Commission ("CPUC") has ruled that under Section 332 it has no jurisdiction to award refund damages because to do so requires rate setting. See *Nova Cellular West, Inc.* v. *AirTouch Cellular of San Diego*, Case No. 98-02-036 (CPUC Sept. 3, 1998) (ordering wireless carrier to adjust its rates and pay a refund is ratemaking) (App. 75a-77a, 78a).[16] Other state regulatory agencies have read Section 332 to be far more limited, concluding that Section 332 preempts only specific determinations of the reasonableness of wholesale wireless rates. See, *e.g.*, *Westside Cellular, Inc.* v. *GTE Mobilnet, Inc.*, 1995 Ohio PUC LEXIS 240, at *6-*9 (Mar. 23, 1995).

The uncertain scope of Section 332 also has fostered significant confusion in a host of proceedings before the Federal Communications Commission ("FCC") and threatens to undermine other federal policies of that agency. For example, "universal service" funding designed to make telephone service reasonably priced and broadly available across the nation depends, in part, on substantial payments by wireless carriers based on their charges for both interstate and intrastate services. See 47 U.S.C. § 254; *Federal-State Joint Board on Universal Serv.*, 12 F.C.C.R. 8776, 9175, 9181 (1997). Effective implementation of this important policy rests on the assumption that "section 332(c)(3) . . . alters the 'traditional' federal-state

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[16] There, a reseller challenged a wireless carrier's refusal to provide electronic billing service with certain rates. The CPUC rejected the reseller's argument that the case was a billing dispute and not a dispute about rates: "In this case, mandating that AirTouch provide particular services at given rates is functionally identical to requiring AirTouch to provide its given services at particular rates. Both actions would constitute 'rate regulation,' and neither remedy is permitted under Section 332." *Id.* (App. 78a); *see also California Wireless Resellers Ass'n v. Los Angeles Cellular Telephone Co.*, No. 98-06-055 (CPUC Nov. 5, 1998) (App. 81a-87a).

relationship with respect to [wireless services] by prohibiting states from regulating rates," and will be undermined if these charges are subject to retroactive adjustment through state law damage awards. See *Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 5318, 5489 (1997).[17] Yet, with respect to intrastate services (a line that is, by its nature, difficult to draw in the wireless context), there has been no conclusive determination regarding the scope of FCC jurisdiction to regulate carriers' billing practices. See *Truth-in-Billing and Billing Format*, 1998 F.C.C. LEXIS 4849 ¶ 13 at *18-*19 (Sept. 17, 1998) (Notice of Proposed Rulemaking seeking comment on "whether the Commission has jurisdiction" to regulate carriers' billing practices).[18]

In short, the lower courts and federal and state regulatory agencies are divided on this important and recurring question of federal law: Whether Section 332 preempts state law claims if, to measure an award of money damages, a court must apply

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[17] *See also Metro Mobile Cts., Inc.*, Nos. CV-95-0051275S, CV-95-05500965, 1996 WL 737480 (Conn. Super. Ct. Dec. 11, 1996); *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 800 (8th Cir. 1997) (regulation of interconnection fees charged by local exchange carriers to wireless carriers), *cert. granted*, 118 S. Ct. 879 (1998).

[18] Separately, the FCC opened a proceeding following a federal court's determination -- contrary to the decision below -- that a primary jurisdiction referral on the issue of the scope of Section 332 rate regulation was appropriate. *See* FCC Pub. Notice, DA-97-2464 (Nov. 24, 1997) (following referral from *Smilow* v. *Southwestern Bell Mobile Sys.*, 1997 U.S. Dist. 19453, *10-11 (D. Mass. July 11, 1997)). The settlement of a related case against the same wireless carrier, however, has effectively disposed of the "rounding up" claims presented to the FCC. *See Penrod* v. *Southwestern Bell Mobile Sys.*, No. 96-L-132 (Ill. Cir. Ct. (Madison County)); *cf.* FCC Pub. Notice, DA-98-945, 1998 F.C.C. LEXIS 2332, *1 (May 18, 1998) (seeking comments regarding alleged failure to disclose in filed tariffs the practice of charging customers in full-minute increments).

state law to determine retroactively the appropriate charges for wireless service. Resolution of that issue by this Court potentially would be controlling in dozens of pending class action lawsuits involving virtually every major wireless carrier and their tens of millions of customers.

B. The Washington Supreme Court's Decision Provides An Ideal Vehicle For This Court To Resolve The Conflicts Regarding The Preemptive Scope Of Section 332.

The Washington Supreme Court's decision squarely presents the issue whether courts can, in effect, retroactively set wireless rates when awarding damages pursuant to state statutory and common law causes of action.

In Section 332, Congress chose clear and unmistakable language dictating that no State "shall have any authority to regulate . . . rates." 47 U.S.C. § 332(c)(3)(A) (1994). Despite that expansive prohibition, Respondents explicitly sought compensatory damages in the form of a rate refund based upon what they would have been charged had AT&T Wireless not engaged in the challenged conduct. App. 4a. The Washington Supreme Court expressly sanctioned such claims by holding that the damages sought by Respondents did not "implicate rate regulation." App. 25a. As a result, the Washington Supreme Court's decision squarely presents the overarching issue of the proper scope of Section 332. Subsumed within this overarching question are several recurring issues of national importance that have generated conflicts among the lower courts and thus warrant resolution by this Court.

First, whether an award of damages is permissible requires a determination of what types of claims constitute a challenge to wireless service "rates." In a related context, this Court recently cautioned against adopting too restrictive a definition of "rates." *Central Office Telephone*, 118 S. Ct. at 1963. In

Central Office Telephone, long distance resellers alleged that AT&T Corp., in violation of state contract and tort law, had promised, but never delivered, various service and billing options in addition to those set forth in the tariffed rates filed with the FCC. The Court held that both claims were preempted under the filed tariff doctrine, rejecting the Ninth Circuit's holding that the claims did not involve rates or ratesetting. *Id.* at 1963.

> The Ninth Circuit thought the filed-rate doctrine inapplicable "[b]ecause this case does not involve rates or ratesetting, but rather involves the provisioning of services and billing." Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa.

Id. (quoting *Central Office Telephone, Inc.* v. *AT&T Co.*, 108 F.3d 981, 990 (9th Cir. 1997) (alteration in original; citation omitted)).

Here, the Washington Supreme Court dismissed *Central Office Telephone* as irrelevant because that case involved the "filed tariff" doctrine. App. 11a n.48. Instead, the court interpreted the term "rates" narrowly, holding that the damages sought by Respondents do not represent a challenge to the "rates" for wireless service provided by AT&T Wireless. App. 25a. But, as the FCC has recognized, the billing increment is an integral component of a wireless rate. See *Competitive Market Conditions with Respect to Commercial Mobile Servs.*, 10 F.C.C.R. at 8868. Thus, regardless whether there is a tariff, wireless rates have meaning only when one knows the billing increment by which they are calculated. The contrary conclusion by the Washington Supreme Court conflicts with this Court's analysis in *Central Office Telephone* and the decisions

of other state and federal courts that have, consistent with *Central Office Telephone*, adopted a broader and more practical reading of the term "rates" with respect to Section 332.[19]

Second, this case also presents the issue whether an award of money damages amounts to "regulation" within the meaning of Section 332. Generally, the common-sense and ordinary meaning of "regulate" is broad: to regulate is to "govern or direct according to rule," to "fix, establish, or control," and to "subject to governing principles or laws." *Black's Law Dictionary* 1286 (6th ed. 1990).[20] Thus, damage awards unquestionably *can* constitute a form of state regulation that is indistinguishable from legislative or executive activity. As this Court has held:

> [R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959); see also *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring) ("'[state] regulation can be as effectively exerted through an award of damages as through some form of preventative relief.'") (alteration in original)

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[19] *See Simons* v. *GTE Mobilnet, Inc.*, No. H-955169 (U.S.D.C., S.D. Tex. Apr. 11, 1996) (App. 62a); *Powers* v. *AirTouch Cellular*, No. N71816 (Cal Super. Ct. (San Diego County) Oct. 6, 1997) (App. 68a-69a); *see also Marcus* v. *AT&T Corp.*, 938 F. Supp. 1158, 1170 (S.D.N.Y. 1996), *aff'd*, 138 F.3d 46 (2d Cir. 1998); *Nova Cellular West, Inc.* v. *AirTouch Cellular of San Diego*, No. 98-02-036 (CPUC Sept. 3, 1998) (App. 75a-77a).

[20] *See also Storer Cable Communications v. City of Montgomery*, 806 F. Supp. 1518, 1543 (M.D. Ala. 1992); *Bishop v. Provident Life and Casualty Insurance Co.*, 749 F. Supp. 176, 178 (E.D. Tenn. 1990).

(quoting *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 521 (1992)); *id.* at 510 (O'Connor, J., concurring in part and dissenting in part) ("A majority of the Court agreed that state common-law damages actions do impose 'requirements'"); *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 578-79 (1981). This Court, however, has not established a definitive framework for determining whether damage awards do, in fact, constitute "regulation," and the lower court decisions on precisely that important issue are in conflict. Compare App. 25a with *Powers* v. *AirTouch Cellular*, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997) (App. 68a-69a).

Here, the Washington Supreme Court acknowledged that "damage awards [may be] tantamount to rate regulation," App. 21a & n.87, but ruled that this legal conclusion is reserved for cases where "the 'filed rate' doctrine was implicated or the claims were completely preempted by the agency's exclusive and plenary authority." App. 22a. Put another way, the court disregarded the practical reality that refund damages require retroactive ratesetting on the theory that state law is preempted only where federal rate regulation occurs through the formal filed tariff process. That holding conflicts with decisions by other courts, which have concluded that similar claims for damages constitute state rate regulation prohibited by Section 332 regardless of any tariff filing. See *Simons* v. *GTE Mobilnet, Inc.*, No. H-955169 (U.S.D.C., S.D. Tex. Apr. 11, 1996) (App. 62a); *Powers* v. *AirTouch Cellular*, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997) (App. 68a-69a).[21]

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[21] *See also Arkansas La. Gas*, 453 U.S. at 578-79 (damage actions are disguised retroactive rate adjustments); *Fax Telecommunicaciones v. AT&T Co.*, 952 F. Supp. 946, 954 (E.D.N.Y. 1996) (enforcing a contract rate that requires a court to determine a reasonable rate is unlawful ratemaking); *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1119-22 (S.D.N.Y. 1992) (refund damages award would effectively require a court to determine a reasonable rate), *aff'd*, 27 F.3d 17 (2d Cir. 1994).

Accordingly, this case squarely presents the issue whether damage awards can amount to "rate regulation prohibited by Section 332." App. 25a.

Third, and more generally, the Washington Supreme Court's decision conflicts with the standards established by this Court for analyzing whether state law claims are preempted under an express preemption provision. See, *e.g.*, *American Airlines*, 513 U.S. at 226-27; *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This Court consistently has ruled that when Congress enacts an express preemption statute, the preemptive scope of the statute is governed, first and foremost, "by the express language" of the statute. *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 517 (1992); see also *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992) (same).[22] At its core, the issue of preemption is a matter of statutory intent, and the Court accordingly begins with "'the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990)).

Nowhere in its decision below does the court mention, let alone analyze, the critical role played by the statutory language and legislative intent reflected in the express preemption provision of Section 332. Instead, the Washington Supreme Court's decision rests on its analysis whether the award of damages in this case presents an actual and direct conflict with a rate determined by the FCC to be reasonable such that a court would be required to "'substitute its judgment for the agency's on the reasonableness of a rate.'" App. 26a. In basing its

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[22] Although Congress' intent is primarily discerned from the language of the statute, courts must also look to the "'structure and purpose of the statute as a whole.'" *Medtronic*, 518 U.S. at 485.

analysis on this erroneous and cramped "conflict" standard, the Washington Supreme Court's decision is inconsistent with express preemption decisions from this Court,[23] and in direct conflict with subsequent decisions by lower state and federal courts. See *Simons* v. *GTE Mobilnet, Inc.*, No. H-955169 (U.S.D.C., S.D. Tex. Apr. 11, 1996) (App. 62a); *Powers* v. *AirTouch Cellular*, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997) (App. 68-69a).

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[23] *See, e.g., American Airlines*, 513 U.S. at 227 (preempting state consumer protection act claims because of potential for "intrusive regulation" of business practices inherent in that type of legislation); *Cipollone*, 505 U.S. at 523-24 (preempting failure-to-warn claims under state law based on statute that prohibited "requirement or prohibition imposed under State law").

CONCLUSION

The petition for a writ of certiorari should be granted.

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December 9, 1998

APPENDICES

APPENDIX A

CORYELLE TENORE, CHARLES F. PETERSON AND KAREN M. COLE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Appellants v. AT&T WIRELESS SERVICES AND MCCAW CELLULAR COMMUNICATIONS, INC. D/B/A CELLULAR ONE, Respondents.

Number 65609-6

SUPREME COURT OF WASHINGTON,

En Banc.

Argued May 19, 1998.

Decided Sept. 10, 1998.

Steve Berman, Erin K. Flory, Seattle, for Appellants.

Stokes, Eitelbach & Lawrence, Michael Kipling, Laura J. Buckland, Kelly Noonan, Seattle, for Respondents.

SMITH, Justice.

Appellants Coryelle Tenore, Charles F. Peterson and Karen M. Cole, on behalf of themselves and all others similarly situated, seek direct review of a judgment of the King County Superior Court which dismissed their class action lawsuit on a Civil Rule (CR) 12(b)(6) motion based upon federal preemption of state law claims under 47 U.S.C. sec. 332(c)(3)(A) and the doctrine of primary jurisdiction. We granted review. We reverse the trial court.

QUESTION PRESENTED

The question presented is whether the trial court was correct in dismissing Appellants' state law claims on a CR 12(b)(6) motion based upon federal preemption under 47 U.S.C. sec. 332(c)(3)(A) and the doctrine of primary jurisdiction.

STATEMENT OF FACTS

On October 24, 1995, Appellants Coryelle Tenore, Charles F. Peterson and Karen M. Cole, individually and on behalf of others similarly situated, filed in the King County Superior Court a class action complaint against Respondents AT&T Wireless Services and McCaw Cellular Communications, Inc. d/b/a Cellular One.[1] Respondent AT&T Wireless Services (AT&T) is a wholly owned subsidiary of AT&T Corporation and provides cellular service in the Northwest region.[2] McCaw Cellular Communications, Inc. d/b/a Cellular One (McCaw Cellular), also named as a defendant, was the largest provider of cellular telephone service in the country until it merged with AT&T.[3] McCaw Cellular no longer exists as a separate entity.[4]

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[1] Br. of Appellants at 3.

[2] Clerk's Papers at 7, 155, 158. Respondents note that AT&T Wireless itself does not hold any cellular licenses, but instead provides cellular telephone service through direct and indirect ownership interests in cellular license holders.

[3] *Id.* at 158. As of 1996, cellular service was in existence for over 13 years, growing at the rate of 50 percent per year. John W. Berresford, *Mergers in Mobile Telecommunications Services: A Primer on the Analysis of Their Competitive Effects*, 48 Fed. Comm. L.J. 247, 256 (1996).

[4] Respondents AT&T and McCaw Cellular, are collectively referred to in this opinion as "AT&T."

In their Second Amended Class Action Complaint, Appellants claimed that Respondent AT&T engaged in "deceptive, fraudulent, misleading and/or unfair conduct" by not disclosing its practice of "rounding" airtime in order to "induce cellular customers to use its cellular service, and/or in order to unfairly profit."[5] "Rounding," "rounding up" or "full minute billing" is a common billing practice in the cellular and long distance telephone industry where fractions of a minute are rounded up to the next highest minute.[6] For example, a call that lasts one minute and one second is charged as a two-minute call, but the subscriber is not informed of the actual duration of the call.[7] Appellants claim this billing practice "results in millions of dollars of excess billing . . . all at the expense of the unwary customer."[8] Appellants additionally claim this practice is "contrary to the 'Service Agreement' . . . which states that the customer is billed only for 'the time you press send until the time you press end.'"[9]

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[5] Clerk's Papers at 156.

[6] *Id.* at 8. Long distance carriers have historically used full minute billing. In a similar class action full minute billing case, the United States Court of Appeals for the District of Columbia recently affirmed dismissal of fraud, negligent misrepresentation, and false advertising claims, holding that no reasonable customer of the long distance telephone service provider could actually have been misled by the standard and traditional practice of billing in whole minute increments. *Alicke v. MCI Comm's. Corp.*, 324 U.S. App. D.C. 150, 111 F.3d 909, 912 (D.C. Cir. 1997).

[7] Clerk's Papers at 156.

[8] *Id.*

[9] *Id.*

Also, Appellants claim cellular customers do not receive the full minutes they have contracted for at a fixed rate under their service plan because of rounding.[10] For example, all subscribers are required to choose between plans that offer varying specified minutes of airtime, such as 30, 60, or 100 minutes, for a fixed monthly rate, beyond which calls are billed at a specified per-minute rate.[11] But a 30-minute plan may not in fact provide 30 full minutes because of rounding. This is what Appellants claim AT&T should have disclosed.[12]

Appellants filed state law claims in the King County Superior Court for breach of contract,[13] negligent misrepresentation, fraud, and violation of the Washington Consumer Protection Act (CPA) under RCW Chapter 19.86.[14] They requested, among other things, injunctive relief and compensatory damages in the form of a refund of the difference between the amount charged by AT&T and the amount class members would have incurred if AT&T had not engaged in the practice of rounding up without disclosing it.[15] On April 29, 1997, AT&T moved for dismissal of the complaint by a CR 12(b)(6) motion based upon federal preemption of state law claims under 47 U.S.C. sec. 332(c)(3)(A) and the doctrine of

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Appellants no longer dispute the breach of contract claim on appeal. Br. of Appellants at 1.

[14] Clerk's Papers at 164-65

[15] *Id.* at 156-57, 166-67.

primary jurisdiction.[16] 47 U.S.C. sec. 332(c)(3)(A) provides in relevant part:

> Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and condition of commercial mobile services.

AT&T contends this statute preempts Appellants' state law claims because the monetary relief sought by Appellants would necessarily require a court to engage in rate regulation in determining the refund award for partial minutes of cellular service.[17] AT&T further claims, under the doctrine of primary jurisdiction, that any challenge to the reasonableness of cellular rates must be deferred to the agency with expertise in rate regulation in this case, the Federal Communications Commissions (FCC).[18]

While AT&T's motion to dismiss was pending, the Court of Appeals, Division I, filed its decision in *Hardy v. Claircom Comm's. Group, Inc.*,[19] a case with a similar fact pattern to this one. The King County Superior Court, the Honorable J. Kathleen Learned, agreed with AT&T that *Hardy* is controlling and granted its motion to dismiss on June 13, 1997, stating:

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[16] *Id.* at 26.

[17] *Id.* at 9.

[18] *Id.* at 23.

[19] 86 Wash. App. 488, 937 P.2d 1128 (1997).

> The Court concludes as a matter of law that this case is controlled by Hardy v. Claircom and therefore the plaintiffs' state law claims are preempted by 47 U.S.C. sec. 332(c)(3)(A), and/or that the doctrine of primary jurisdiction requires that plaintiffs' claims be referred to the FCC.[20]

Appellants, however, contend they are only challenging the allegedly misleading advertising practices of AT&T and not the underlying rates or charges.[21] They argue it is within the authority of state courts to resolve their state law claims without FCC intervention.[22] After the order of dismissal, Appellants sought direct review by this Court, which we granted on January 6, 1998.

DISCUSSION

Standard of Review

Under CR 12(b)(6), a complaint can be dismissed for "failure . . . to state a claim upon which relief can be granted." A dismissal under this rule involves a question of law which is reviewed de novo by an appellate court and is appropriate only if it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery.[23] In such a case, a plaintiff's allegations are presumed to be true and a court may

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[20] Order of Dismissal. Clerk's Papers at 279.

[21] Br. of Appellants at 6.

[22] *Id.* at 29-30.

[23] *Hoffer v. State*, 110 Wash. 2d 415, 420, 755 P.2d 781 (1988), *aff'd*, 113 Wash. 2d 148, 776 P.2d 963 (1989); *Bravo v. Dolsen Cos.*, 125 Wash. 2d 745, 750, 888 P.2d 147 (1995).

consider hypothetical facts not included in the record.[24] CR 12(b)(6) motions should be granted "sparingly and with care" and "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief."[25]

Hardy v. Claircom Communications Group, Inc.

In dismissing Appellants' complaint, the trial court concluded as a matter of law that it was bound by the decision of the Court of Appeals, Division I, in *Hardy v. Claircom Comm's. Group, Inc.*,[26] the only Washington case addressing the specific issues now before this Court.[27] Appellants argue that *Hardy* should not control the decision in this case and that the two cases are distinguishable.[28] AT&T claims *Hardy* is on point and urges this Court to follow it.[29]

The facts in *Hardy* are somewhat similar to the facts in this case. In *Hardy*, Appellants Michael J. Hardy and Michael Lair brought class action lawsuits in the King County Superior Court against Claircom Communications Group, Inc., d/b/a AT&T

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[24] *Cutler v. Phillips Petroleum Co.*, 124 Wash. 2d 749, 755, 881 P.2d 216 (1994), *cert. denied*, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873 (1995).

[25] *Hoffer*, 110 Wash. 2d at 420 (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure 1357, at 604 (1969)); *Orwick v. City of Seattle*, 103 Wash. 2d 249, 254, 692 P.2d 793 (1984).

[26] 86 Wash. App. 488, 937 P.2d 1128 (1997).

[27] Order of Dismissal. Clerk's Papers at 279.

[28] Br. of Appellants at 23.

[29] Br. of Resp'ts at 6-7.

Wireless Services (Claircom) and GTE Airphone, Inc. (GTE) claiming breach of contract, negligent misrepresentation, fraud and violation of the Washington Consumer Protection Act.[30] Claircom and GTE provide air-to-ground radiotelephone services for passengers on commercial aircraft.[31] Appellants claimed the companies were liable because the promotional materials provided to passengers aboard aircraft did not disclose the companies' practice of rounding up airtime.[32] The trial courts dismissed both appellants' actions ruling their claims were preempted by 47 U.S.C. sec. 332(c)(3)(A) and barred by the filed tariff doctrine.[33] The Court of Appeals affirmed on the same grounds.[34]

Filed Rate or Filed Tariff Doctrine[35]

The "filed rate" doctrine, also known as the "filed tariff"[36] doctrine, is a court-created rule to bar suits against regulated utilities involving allegations concerning the reasonableness of

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[30] *Hardy*, 86 Wash. App. at 489-91.

[31] *Id.* at 490.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *See Wegoland Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112 (S.D.N.Y. 1992) *aff'd*, 27 F.3d (2d Cir. 1994) for a comprehensive history of the doctrine.

[36] "Tariff" is defined as "Schedules of rates and regulations filed by common carriers." 47 C.F.R. 61.3(ii) (1997). Courts commonly use "filed rate" to refer to a tariff.

the filed rates.[37] This doctrine provides, in essence, that any "filed rate" a rate filed with and approved by the governing regulatory agency is per se reasonable and cannot be the subject of legal action against the private entity that filed it.[38] The purposes of the "filed rate" doctrine are twofold: (1) to preserve the agency's primary jurisdiction to determine the reasonableness of rates, and (2) to insure that regulated entities charge only those rates approved by the agency.[39] These principles serve to provide safeguards against price discrimination and are essential in stabilizing prices.[40] But this doctrine, which operates under the assumption that the public is conclusively presumed to have knowledge of the filed rates, has often been invoked rigidly, even to bar claims arising from fraud or misrepresentation.[41]

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[37] *Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994).

[38] *Id.*

[39] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78, 101 S. Ct. 2925, 2930, 69 L. Ed. 2d 856 (1981).

[40] *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126, 110 S. Ct. 2759, 2766, 111 L. Ed. 2d 94 (1990).

[41] *Kansas City S. R. Co. v. Carl*, 227 U.S. 639, 653, 33 S. Ct. 391, 395, 57 L. Ed. 683 (1913) ("Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper"); *See also Marco Supply Co. v. AT&T Comm's., Inc.*, 875 F.2d 434 (4th Cir. 1989) (doctrine precludes claim of price misrepresentation); *Taffet v. Southern Co.*, 967 F.2d 1483 (11th Cir. 1992) (en banc) (allegedly overcharged or defrauded customers suffered no cognizable injury because of filed rate); *Southwestern Bell Tel. Co. v. Metro-Link Telecom, Inc.*, 919 S.W.2d 687 (Tex. App. 1996) (doctrine bars action for various allegedly anticompetitive practices committed by long distance provider).

Courts have construed the "filed rate" doctrine broadly in dismissing lawsuits against telecommunications carriers involving direct or indirect challenges to the reasonableness of rates. In *Marcus v. AT&T Corp.*, subscribers to AT&T Corporation's long distance telephone service brought class action lawsuits in the United States District Court claiming fraud, deceptive acts and practices, false advertising, negligent misrepresentation, and other state law actions for the company's alleged practice of rounding up call charges without adequate disclosure.[42] In addition to other forms of relief, plaintiffs sought compensatory damages from the defendant.[43] AT&T claimed the "filed rate" doctrine barred their claims, but plaintiffs asserted their claims did not implicate the doctrine because they merely challenged AT&T's alleged nondisclosure and deceptive advertising practices, and not the reasonableness of the underlying rates.[44] The court dismissed plaintiffs' state claims for damages in its entirety based upon the "filed rate" doctrine, stating that calculation of the damages plaintiffs sought would necessarily require the court to determine a reasonable rate in direct contravention of the "filed rate" doctrine.[45] The United States Court of Appeals for the Second

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[42] 938 F. Supp. 1158, 1164 (S.D.N.Y. 1996).

[43] *Id.*

[44] *Id.* at 1170.

[45] *Id.* at 1172.

Circuit affirmed the decision on appeal.[46] Other courts have dismissed similar actions under the "filed rate" doctrine.[47]

Respondent AT&T cites the *Marcus* case and related decisions in support of its federal preemption argument.[48] This contention, however, is without merit, simply because this case does not implicate the "filed rate" doctrine. Under Section 203 of the Federal Communications Act of 1934 (FCA), all telecommunications common carriers are required to file tariffs with the FCC.[49] Most telecommunications carriers, including long distance telephone service providers, come within the meaning of "common carrier," which is broadly defined as "any person engaged in rendering communication service for hire to

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[46] *Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998).

[47] *See Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994); *Cahnmann v. Sprint Corp.*, 961 F. Supp. 1229 (N.D. Ill. 1997) *aff'd*, 133 F.3d 484 (1998); *Porr v. NYNEX Corp.*, 230 A.D.2d 564, 660 N.Y.S.2d 440 (1997).

[48] Respondent called the Court's attention to a recent United States Supreme Court decision, *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, U.S., 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998), which reversed a ruling of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit had affirmed a magistrate judge's award of damages on state law claims despite the existence of a filed tariff, stating "because this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing under several contracts, the filed rate doctrine does not apply." *Central Office Tel., Inc. v. American Tel. & Tel. Co.*, 108 F.3d 981, 990 (9th Cir. 1997). In reversing the Ninth Circuit, the Supreme Court reasoned that "rates do not exist in isolation . . . [but] have meaning only when one knows the services to which they are attached." Accordingly, the Court ruled the fact services and billing are involved instead of rates or ratesetting does not make the filed rate doctrine inapplicable. *American Tel. & Tel. Co.*, 118 S. Ct. at 1963.

[49] 47 U.S.C. 203(a).

the public."[50] Thus, as required under Section 203(a) of the FCA, the defendants AT&T, NYNEX, and Sprint in *Marcus*, *Wegoland*, *Cahnmann* and *Porr* each had tariffs on file with the FCC.

In this case, Respondents AT&T Wireless Services and McCaw Cellular Communications, Inc. d/b/a Cellular One, are cellular telephone service providers, broadly characterized as commercial mobile radio service providers, and are specifically exempted from tariff filing requirements by the FCC.[51] Because there is no tariff filing requirement, the reasonableness of rates charged by commercial mobile radio service (CMRS) providers is not determined by the FCC.[52] Accordingly, not only are there

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[50] 47 C.F.R. 101.3 (1997).

[51] Section 332 of the FCA which governs "mobile services" construes cellular telephone service providers as common carriers, and thus companies providing cellular services are subject to many of the same regulations as long distance telephone service providers. 47 U.S.C. 332(c)(1)(A). For example, cellular telephone service providers must furnish service to all customers upon reasonable request and may not charge rates or engage in practices that are unjust or unreasonable. 47 U.S.C. 201, 202. However, cellular telephone service providers and other similar mobile entities, commonly referred to as "Commercial Mobile Radio Service" (CMRS) providers, are specifically exempted from complying with Section 203 (section requiring tariff filing). 47 C.F.R. 20.15(a), (c) (1997); *see* 47 C.F.R. 20.3 (1997) for a definition of CMRS and 20.9(a), for a listing of the 13 mobile services currently considered by the FCC to be CMRS. Also, in an exhaustive FCC order implementing various provisions of the FCA's 1993 amendments, the FCC concluded that sufficient competition in the cellular marketplace obviates any need for conventional regulation and decided to "forbear from imposing any tariff filing obligations upon CMRS providers." Second Report and Order, In the Matter of Implementing of Sections 3(n) and 332 of the *Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1418 and 1478 (1994).

[52] 47 C.F.R. 20.15(a), (c).

no tariffs on file, but the two purposes behind the "filed rate" doctrine preserving an agency's primary jurisdiction to determine the reasonableness of rates and insuring that only those rates approved are charged do not apply in this case.[53] The authorities relied upon by Respondent AT&T are thus not applicable.

In addition, AT&T claims the recent Court of Appeals, Division I, case, *Hardy v. Claircom Comm's. Group, Inc.*, is controlling, although AT&T rests its argument on preemption and concedes the "filed rate" doctrine is not directly applicable.[54] In *Hardy*, both defendants Claircom and GTE had tariffs on file with the FCC, and accordingly, to the extent dismissal was predicated upon the "filed rate" doctrine, the court's decision was correct.[55] However, there was a period of five months during which Claircom's tariff was not filed, and the court correctly used preemption analysis to resolve the case during that brief period.[56]

Federal Preemption

Recognizing the rapid growth of the cellular telecommunications industry, Congress in 1993 amended the FCA, 47 U.S.C. §§ 151-229 to provide a comprehensive and uniform federal regulatory framework for all commercial mobile

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[53] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78, 101 S. Ct. 2925, 2930, 69 L. Ed. 2d 856 (1981).

[54] Br. of Resp'ts at 16-17.

[55] *Hardy*, 86 Wash. App. at 493. Air-to-ground radio mobile service providers are subject to greater regulatory control than other CMRS providers, and thus are required to file tariffs with the FCC.

[56] 86 Wash. App. at 495-96.

radio service (CMRS) providers.[57] To accomplish its objective of regulatory uniformity and deregulation of CMRS, Congress amended Section 332 of the FCA to provide:

> Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. According to the FCC, implementing preemption rules will serve an important purpose: to "help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede the federal mandate for regulatory parity."[58] AT&T asserts 47 U.S.C. sec. 332(c)(3)(A) preempts all of Appellants' state law claims.

The doctrine of preemption originates from the Supremacy Clause in Article VI of the United States Constitution, which generally results in declaring invalid state laws that are contrary to or interfere with the laws of Congress.[59] The principal inquiry in preemption analysis is Congress' objective or purpose in enacting a law.[60] The intent of Congress may be expressly

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[57] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, 6002, 107 Stat. 312, 387-97 (1993).

[58] *Second Report and Order*, 9 FCC Rcd at 1421.

[59] U.S. Const. art. VI, cl. 2; *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604, 111 S. Ct. 2476, 2481, 115 L. Ed. 2d 532 (1991).

[60] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407 (1992).

stated in a statute or implicitly contained in its structure and design.[61] If Congress enacts a provision defining the preemptive reach of a statute, matters beyond that expressed scope are not preempted.[62]

Appellants argue the express language of Section 332 itself, which defines the FCA's preemptive reach, allows states to regulate "the other terms and conditions of commercial mobile service" that do not relate to market entry or rate regulation.[63] They assert these "other terms and conditions" include a carrier's "advertising, marketing and contracting, which are distinct from the federally regulated issues of rates and entry."[64] A Congressional House Report on the Omnibus Budget Reconciliation Act of 1993 tends to support Appellants' contention:

> It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protections matters . . .[65]

At least one United States District Court that addressed the "terms and conditions" clause of Section 332 concluded the

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[61] *Id.*

[62] *Id.* at 517.

[63] Br. of Appellants at 6. *See* 47 U.S.C. 332(c)(3)(A).

[64] Br. of Appellants at 10.

[65] H.R. REP. No. 103-111, 103rd Congress, 1st Sess. 211, 261, reprinted in 1993 U.S.C.A.A.N. 378, 588.

clause "permits state regulation of cellular telephone service providers in all areas other than the providers' entry into the market and the rates charged to their customers."[66]

Appellants additionally claim the "savings clause" in Section 414 of the FCA indicates Congressional intent to preserve state law actions that do not challenge market entry or rates charged to subscribers.[67] 47 U.S.C. sec. 414 provides:

> Nothing in the chapter . . . shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Some courts have cited this provision in ruling against preemption of state law claims for charges involving billing or advertising practices.[68] As Respondent AT&T contends, these cases, although factually similar, are not directly on point because they involve the question whether cases should be removed from state courts to federal courts and remain in those courts under the complete preemption doctrine.[69]

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[66] *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541, 552 (D.N.J. 1996); *see also Mountain Solutions, Inc. v. State Corp. Comm'n*, 966 F. Supp. 1043, 1048 (D. Kan. 1997).

[67] Br. of Appellants at 7. *See* 47 U.S.C. 414.

[68] *Bennett v. Alltel Mobile Communications of Alabama, Inc.*, No. 96-D-232- N, slip op. at 11 (M.D. Ala. 1996); *Weinberg v. Sprint Corp.*, 165 F.R.D. 431, 439 (D.N.J. 1996); *Sanderson v. AWACS, Inc.*, 958 F. Supp. 947, 956-58 (D. Del. 1997); *DeCastro*, 935 F. Supp. at 551.

[69] Br. of Resp'ts at 22-27. "Complete preemption" is a related but different procedural doctrine than ordinary preemption and is invoked to determine whether a state law claim should be moved to federal court or whether the claims in federal court should be remanded to state court. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S. Ct. 1542, 1546, 95 L. Ed. 2d 55

The courts in *Bennett, Sanderson and DeCastro*, applying 47 U.S.C. sec. 332(c)(3)(A), each ruled against complete preemption of plaintiffs' state law claims and remanded the cases to state courts.[70] Thus, the savings clause in Section 414, together with the "terms and conditions" clause in Section 332, defeats preemption in favor of preserving state law claims that do not attack or regulate market entry or rates.[71]

The gravamen of Respondent AT&T's argument, however, is that Appellants' request for monetary damages requires a court to retroactively establish new rates in determining damages, which, in effect, is state rate-making explicitly preempted by 47 U.S.C. sec. 332(c)(3)(A) of the FCA.[72] Appellants assert they only challenge AT&T's inadequate disclosure practices in connection with billing, and do not

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(1987). This doctrine provides that, in limited situations, ordinary common law complaints can be converted into federal claims when the preemptive force of a federal statute is sweeping and extraordinary. *Boyle v. MTV Networks, Inc.*, 766 F. Supp. 809, 814-15 (N.D. Cal. 1991). The United States Supreme Court has stressed the limited scope of this doctrine, finding complete preemption in only two instances: under 301 of the Labor Management Relations Act and under 502(a) of the Employee Retirement Income Security Act of 1974. *DeCastro*, 935 F. Supp. at 549.

[70] *Bennett*, No. 96-D-232-N at 14; *Sanderson*, 958 F. Supp. at 956-58; *DeCastro*, 935 F. Supp. at 554-55.

[71] Congress could have, if it desired, completely preempted state law by stating that 332(c)(3)(A) would preempt all state laws that related to the rates charged, instead of providing for preemption only where state law regulates "the entry of or the rates charged" by CMRS providers. Compare ERISA's broader preemption clause which states that the law "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . .." 29 U.S.C. 1144(a).

[72] Br. of Resp'ts at 6.

contest the reasonableness or legality of the underlying rates.[73] AT&T counters by stressing that Appellants' claim is essentially a disguised form of attack on the reasonableness of its rates.

As authority for its contention, Respondent AT&T first cites three class action rounding cases that were dismissed by various courts.[74] Those cases, however, do not significantly support AT&T's position. *Rogers*, an Indiana Superior Court case, is a cursory order devoid of facts or legal analysis.[75] In *Simons*, a case before the United States District Court for the Southern District of Texas, Respondent AT&T itself stated in its brief that the plaintiffs "challenged the reasonableness of early termination fees," which made it proper for the court to dismiss on preemption grounds.[76] And in *Powers*, a San Diego County Superior Court case, the plaintiffs claimed in their complaint that they were damaged by defendant's "methods of determining or calculating the quantity of chargeable airtime

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[73] Br. of Appellants at 5.

[74] *Rogers v. Westel-Indianapolis Co.*, No. 49D03-9602-CP-0295 (Ind. Super. Ct. July 1, 1996) (superior court dismissed class action concluding it did not have jurisdiction because the remedy requested by plaintiffs would require a change of rates and should therefore be heard by the FCC or a federal court); *Simons v. GTE Mobilnet*, No. H-95-5169 (S.D. Tex. April 11, 1996) (court dismissed case as preempted by the FCA where plaintiffs challenged the reasonableness of early termination fees in cellular service contracts); *Powers v. Airtouch Cellular*, No. N71816 (San Diego County. Super. Ct. Cal. Oct. 6, 1997) (case dismissed because although plaintiffs alleged suit was based on defendant's alleged failure to disclose "teardown charges," the real focus was on the legality or reasonableness of those charges.)

[75] *Rogers*, at 1-2.

[76] Br. of Resp'ts at 19.

usage," which, as the court found, seemed more like an attack on rates than a challenge to inadequate disclosure.[77]

In this case, Appellants do not contend they were injured by AT&T's practice of rounding its airtime. Instead, they only claim they were damaged by AT&T's inadequate disclosure concerning that practice. They assert this type of claim, which alleges fraud or deceptive advertising and not the reasonableness of rates, should not be preempted. They cite several cases in support of their position.[78]

Appellants also cite *Kellerman v. MCI Telecomm's. Corp.*[79] In that case, plaintiffs, seeking damages, brought a class action against their long distance telephone service provider for breach of Illinois' consumer fraud and deceptive trade practices acts, claiming that certain of defendant's advertisements and promotional materials were fraudulent and deceptive.[80] The Illinois Supreme Court held the state law claims were not

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[77] *Powers*, at 1.

[78] *In re Long Distance Telecomm's. Litig.*, 831 F.2d 627 (6th Cir. 1987) (in plaintiff's fraud claims arising from defendant's alleged failure to disclose its practice of charging long distance customers for uncompleted calls, ring time and holding time, court held the state law claims were not preempted because they did not conflict with the FCA and were within the conventional experience of the courts); *Bruss Co. v. Allnet Communication Servs., Inc.*, 606 F. Supp. 401 (N.D. Ill. 1985) (court denied motion to dismiss claims for fraud and unfair trade practices involving alleged overcharges for phone services); *American Inmate Phone Sys., Inc. v. US Sprint Comm's. Co.*, 787 F. Supp. 852 (N.D. Ill. 1992); *Weinberg v. Sprint Corp.*, 165 F.R.D. 431 (D.N.J. 1996).

[79] 112 Ill. 2d 428, 493 N.E.2d 1045, 98 Ill. Dec. 24, *cert. denied*, 479 U.S. 949, 107 S. Ct. 434, 93 L. Ed. 2d 384 (1986).

[80] *Kellerman*, 493 N.E.2d at 1047-48.

preempted, relying on the FCA's savings clause, Section 414, concluding:

> The subject matter of plaintiffs' complaints involves neither the quality of defendant's service nor the reasonableness and lawfulness of its rates. Plaintiffs only allege that defendant disseminated fraudulent and deceptive advertisements concerning the cost of its long distance telephone service.[81]

Appellants additionally cite *DeCastro v. AWACS, Inc.*[82] In that case, plaintiffs brought a class action against defendant, a cellular telephone service provider, making various state law claims relating to defendant's inadequate disclosure concerning certain billing practices.[83] The case was removed to federal court on defendant's motion, but the court remanded, ruling that the FCA does not provide an enforcement mechanism for claims involving failure to disclose billing practices, stating:

> These two claims center around Comcast's alleged failure to disclose a particular billing practice; they do not challenge the billing practice as unreasonable or contrary to law, nor does their resolution require a court to assess the reasonableness of the defendant's billing practice.[84]

Kellerman and *DeCastro* both conclude that the FCA does not displace, but instead supplements, state law claims against service providers for misrepresentation, fraud and unfair billing

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[81] *Id.* at 1051.

[82] 935 F. Supp. 541 (D.N.J. 1996).

[83] *Id.* at 545.

[84] *Id.* at 550.

practices.[85] The FCC itself has stated that the savings clause, Section 414:

> Preserves the availability against interstate carriers of such preexisting state remedies as tort, breach of contract, negligence, fraud, and misrepresentation remedies generally applicable to all corporations operating in the state, not just telecommunications carriers.[86]

AT&T challenges those cases as not constituting direct authority for the issue now before this Court. AT&T correctly notes that many of those cases were decided before Congress amended Section 332, and do not therefore refer to that provision; and that other cases involve the "complete preemption" doctrine, a related but different analysis than preemption under the explicit language of Section 332. Those cases nevertheless offer some support for Appellants' assertion that their state claims are not preempted.

Respondent AT&T also cites cases which offer support for its position, but those cases are not directly on point. Respondent cites authorities which stand for the proposition that damage awards are tantamount to rate regulation.[87] But in

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[85] *Kellerman*, 493 N.E.2d at 1051; DeCastro, at 554.

[86] *In re Operator Servs. Providers of Am.*, 6 FCC Rcd 4475, 4477 (1991); *see also In the Matter of Richman Bros. Records, Inc. v. U.S. Sprint Communications Co.*, 10 FCC Rcd 13639, 13641 (1995) (section 414 preserves claims against carriers as against other corporations, such as liability for misleading advertising).

[87] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-79, 101 S. Ct. 2925, 2931, 69 L. Ed. 2d 856 (1981) (damage actions are disguised retroactive rate adjustments and thus barred by filed rate doctrine); *Chicago and N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 323, 101 S.

each of those cases, either the harsh rule of the "filed rate" doctrine was implicated or the claims were found to be completely preempted by the regulatory agency's exclusive and plenary authority.

In *Hardy v. Claircom Communications Group, Inc.*, the Court of Appeals, Division I, properly relied upon the "filed rate" doctrine to dismiss all of plaintiffs' claims arising under it.[88] However, for the five-month period during which there was no tariff on file, the court held that Section 332 preempted it, stating, "Hardy's claims implicate not only the advertising practices of AT&T Wireless but also the reasonableness of the carrier charging the tariff rate in light of those practices."[89] The court concluded the claims are preempted because Hardy is challenging the reasonableness of the tariff "in light of those practices."[90] But there was no tariff filed for the five-month period.[91] And the court used Section 332 preemption analysis

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Ct. 1124, 1133, 67 L. Ed. 2d 258 (1981) (state court action dismissed where Interstate Commerce Commission's authority under the Interstate Commerce Act to regulate abandonments is exclusive and plenary); *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1121 (S.D.N.Y. 1992) (damages award would require a court to determine a reasonable rate); *Weinberg v. Sprint Corp.*, No. BER-L-12073-95 (N.J. Sup. Ct. 1996) (a court's calculation of prorated rate for calls consisting of less than one minute amounts to a statement that phone companies should charge subscribers by the second in direct conflict with FCC determinations that rounding up is legitimate).

[88] 86 Wash. App. 488, 495, 937 P.2d 1128 (1997).

[89] *Id.* at 495.

[90] *Id.* at 496.

[91] *Id.* at 495.

solely to address the "5-month period during which AT&T Wireless concededly had no filed tariff in place."[92]

Respondent now argues that cases have held that damages implicate rate adjustment and are tantamount to rate regulation; and even though those cases involved the "filed rate" doctrine, that reasoning should be extended to dismiss claims requesting damages because, although there is no "filed tariff," the language of 47 U.S.C. sec. 332(c)(3)(A) preempts rate regulation.

The position of Appellants, though, is bolstered by *Nader v. Allegheny Airlines, Inc.*[93] In that case the plaintiff was denied boarding or "bumped" from his reserved and confirmed seat on Allegheny Airlines because the airline had overbooked its flights.[94] Instead of accepting "denied boarding compensation," plaintiff brought a common law action in the United States District Court for the District of Columbia claiming fraudulent misrepresentation because defendant did not disclose its deliberate overbooking practices[95]. The plaintiff was not contesting the reasonableness of the overbooking practice itself, but only the nondisclosure of it. The District Court found for the plaintiff, but the United States Court of Appeals for the District of Columbia reversed, ruling that the matter must be referred to the Civil Aeronautics Board (CAB) to determine whether defendant's alleged failure to disclose its deliberate

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92 *Id.*

93 426 U.S. 290, 96 S. Ct. 1978, 48 L. Ed. 2d 643 (1976).

94 *Nader*, 426 U.S. at 292-94.

95 *Id.* at 294-95.

overbooking practice is deceptive.[96] The Court reversed mainly on primary jurisdiction grounds, but did address an issue relevant to this case.

The Supreme Court in *Nader* noted that the Court of Appeals relied on *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.* for its conclusion.[97] Abilene is a "filed rate" doctrine case which dismissed a state law action that challenged a published carrier rate as "unjust and unreasonable" by reasoning that an action for damages attacking the reasonableness of federally regulated rates would undermine the purpose of the Interstate Commerce Act.[98] The Court in *Nader* distinguished *Abilene* on the grounds that in *Nader* there was no "irreconcilable conflict between the statutory scheme and the persistence of common-law remedies."[99] In *Abilene*, the carrier would be put in an "untenable position" because it "could not abide by the rate filed with the Commission, as required by statute, and also comply with a court's determination that the rate was excessive."[100] The Court in *Nader* noted that in such a case, "the conflict between the court's common-law authority and the agency's ratemaking power was direct and unambiguous." [101] The Court then stated that in the case before it, the Court "in contrast, is not called upon to substitute its judgment for the agency's on

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[96] *Id.* 295-97.

[97] *Texas & Pac. R. Co. v Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907). *Nader*, 426 U.S. at 298.

[98] *Nader*, at 298-99 (discussing *Abilene*).

[99] *Id.* at 299.

[100] *Id.*

[101] *Id.*

the reasonableness of a rate."[102] That was because there was no tariff provision requirement that airlines engage in or disclose the practice of overbooking.[103] The Court concluded any "impact on rates that may result from the imposition of tort liability . . . would be merely incidental." [104] Thus, the Supreme Court reversed, holding that because the action "does not turn on a determination of the reasonableness of a challenged practice," but only on the issue of disclosure of that practice, "the standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts."[105]

Similarly, in this case, the FCC does not require CMRS providers such as Respondent AT&T to file tariffs.[106] AT&T does not dispute that billing and advertising practices are not governed exclusively by the FCA, if at all. This is a question we need not consider. Appellants do not attack the reasonableness of AT&T's practice of rounding up call charges. They challenge only nondisclosure of the practice. *Nader* addresses the precise issue now before this Court. We consider it applicable authority.

There is sufficient reliable authority for this Court to conclude that the state law claims brought by Appellants and the damages they seek do not implicate rate regulation prohibited by Section 332 of the FCA. The award of damages is not per se rate regulation, and as the United States Supreme Court has

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[102] *Id.*

[103] *Id.* at 300.

[104] *Id.*

[105] *Id.* at 305.

[106] 47 C.F.R. 20.15(a), (c).

observed, does not require a court to "substitute its judgment for the agency's on the reasonableness of a rate."[107] Any court is competent to determine an award of damages.[108]

Primary Jurisdiction

In dismissing Appellants' complaint, the King County Superior Court concluded their state law claims were preempted by Section 332 of the FCA "and/or that the doctrine of primary jurisdiction requires that plaintiffs claims be referred to the FCC."[109]

"Primary jurisdiction" is a doctrine which requires that issues within an agency's special expertise be decided by the appropriate agency.[110] Under this doctrine claims must be referred to an agency if (1) the administrative agency has the authority to resolve the issues that would be referred to it by the court; (2) the agency has special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues; and (3) the claim before the court involves issues that fall within the scope of a pervasive

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[107] *Nader*, 426 U.S. at 299. *See also Bennett v. Alltel Mobile Comm's. of Ala., Inc.*, No. 96-D-232-N, slip op. at 6 (1996).

[108] The conclusion that Appellants' claims are not preempted by Section 332 is limited to that question and does not address the merits of the case.

[109] Order of Dismissal. Clerk's Papers at 279.

[110] *Vogt v. Seattle-First Nat'l Bank*, 117 Wash. 2d 541, 554, 817 P.2d 1364 (1991); *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-64, 77 S. Ct. 161, 165, 1 L. Ed. 2d 126 (1956).

regulatory scheme creating a danger that judicial action would conflict with the regulatory scheme.[111]

Respondent AT&T asserts the doctrine of primary jurisdiction requires that this matter be decided by the FCC. The basis of AT&T's argument is no different than its contention concerning preemption Appellants' request for damages in effect requires a court to engage in rate regulation in determining a reasonable charge for partial minutes of airtime and thus it should be referred to the FCC which has special competence and expertise in rate regulation. AT&T cites several cases to support its position. We do not consider those cases persuasive.[112] Issues which call into question the legality or reasonableness of a carrier's rates should properly be referred to the FCC. In our discussion on preemption we have already concluded that Appellants' state law claims for nondisclosure did not constitute a challenge to the reasonableness of the rates, notwithstanding that they were requesting damages.

Appellants cite cases which hold that matters not pertaining to tariffs or rates do not require agency expertise, but fall within the conventional competence of courts without the need for

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[111] *In re Real Estate Brokerage Antitrust Litig.*, 95 Wash. 2d 297, 302-03, 622 P.2d 1185 (1980).

[112] *Smith v. Spring Comm's. Co.*, No. 96-2067 (N.D. Calif. 1996); *AT&T v. IMR Capital Corp.*, 888 F. Supp. 221, 224 (D. Mass. 1995); *Porr v. NYNEX Corp.*, 230 A.D.2d 564, 660 N.Y.S.2d 440 (N.Y. App. Div. 1997). *See also Kaplan v. ITT-U.S. Transmission Sys., Inc.*, 589 F. Supp. 729 (E.D.N.Y. 1984), which supports AT&T's position. The plaintiff in that case brought suit claiming nondisclosure of charges for unanswered telephone calls. The United States District Court dismissed the case on primary jurisdiction grounds, stating that although "the plaintiff in this case is not challenging the reasonableness of a rate or tariff directly, he is challenging the reasonableness of a particular practice defendant's nondisclosure policy . . .." *Kaplan*, 589 F. Supp. at 732-33.

referral to the FCC.[113] In *Nader* v. *Allegheny Airlines, Inc.*, plaintiff brought common law actions against defendant Allegheny Airlines over nondisclosure of its overbooking practices. The Supreme Court held the doctrine of "primary jurisdiction" did not require the misrepresentation claim to be referred to the regulatory agency, the Civil Aeronautics Board (CAB).[114] The Court stated:

The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry. The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case.[115]

Similarly, in this case there is no conflict between the authority of the FCC and that of a court in deciding whether AT&T's advertising practices are misleading. As in *Nader*, Appellants in this case do not challenge the reasonableness of AT&T's underlying practice of rounding its call charges. Also,

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[113] *National Comm's. Ass'n v. AT&T Co.*, 46 F.3d 220 (2d Cir. 1995); *Kellerman v. MCI Telecomm's. Corp.*, 134 Ill. App. 3d 71, 479 N.E.2d 1057, 89 Ill. Dec. 51 (1985), *aff'd*, 112 Ill. 2d 428, 493 N.E.2d 1045, 98 Ill. Dec. 24, *cert. denied*, 479 U.S. 949, 107 S. Ct. 434, 93 L. Ed. 2d 384 (1986); *Pace Membership Warehouse, Inc. v. US Sprint Comm's. Co.*, No. 90- F-2121, 1991 U.S. Dist. LEXIS 19788 (D. Colo. Feb. 8, 1991); *Source Assocs., Inc. v. MCI Telecomm's. Corp.*, 1989 WL 134580 (D. Kan. 1989); *Redding v. MCI Telecomm's. Corp.*, No. C-86-5498-CAL, 1987 U.S. Dist. LEXIS 16073 (N.D. Cal. Sept. 29, 1987).

[114] *Nader*, 426 U.S. at 292-95, 304-05.

[115] *Id.* at 305-06.

although the FCC enacted the preemption provision in Section 332 to promote uniformity, it did so primarily to prevent burdensome and unnecessary state regulatory practices, and not to subject the CMRS infrastructure to rigid control.[116] Nor does the FCC have exclusive authority over advertising and billing practices, if at all.

AT&T also argues FCC jurisdiction is appropriate because an award of damages would violate "47 U.S.C. sec. 202, which specifically prohibits price discrimination among customers."[117] In making this argument, however, AT&T overlooks the fact that the price discrimination must first be "unjust or unreasonable."[118] 47 U.S.C. sec. 202(a) states, in relevant part, "It shall be unlawful for any common carrier to make any *unjust or unreasonable* discrimination in charges, practices . . . or services for or in connection with like communication service . . . ." (Emphasis added.)

Section 202 has traditionally been used by companies in filing complaints with the FCC to allege discriminatory practices by carriers charging different rates for like services or used by the FCC in rejecting tariff filings that attempted to charge different prices for like services.[119] Courts have used a three-

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[116] *See Second Report and Order*, 9 FCC Rcd at 1413, 1418, 1478 (although there is congressional intent to create regulatory symmetry among CMRS, sufficient competition in the cellular marketplace obviates any need for conventional regulation and thus CMRS providers are exempt from tariff filing requirements).

[117] Br. of Resp'ts at 40-41.

[118] 47 U.S.C. 202(a).

[119] *American Broad. Cos. v. F.C.C.*, 213 U.S. App. D.C. 369, 663 F.2d 133 (D.C. Cir. 1980); *Ad Hoc Telecomm's. Users Comm. v. F.C.C.*, 220 U.S. App. D.C. 241, 680 F.2d 790 (D.C. Cir. 1982); *MCI Telecomm's. Corp. v.*

part test in determining whether a carrier is discriminating in violation of Section 202(a): (1) whether the services are "like"; (2) if so, whether there is a price difference between them; and (3) if there is such a difference, whether that difference is unreasonable.[120] The significant inquiry is whether two services are "like." In making this determination, courts use an FCC developed test known as the "functional equivalency test."[121] Under this test, the focus of the inquiry centers on whether the services in question are "different in any material functional respect."[122]

AT&T relies on two authorities for its argument, but both are "filed rate" doctrine cases and thus offer no significant support.[123] Accordingly, because Appellants do not challenge a practice requiring technical and expert evaluation by the FCC, and because Section 202 does not apply, we conclude the

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F.C.C., 286 U.S. App. D.C. 316, 917 F.2d 30 (D.C. Cir. 1990).

[120] *MCI Telecomm's. Corp.*, 917 F.2d at 39; *Competitive Telecomm's. Ass'n v. F.C.C.*, 302 U.S. App. D.C. 423, 998 F.2d 1058, 1061 (D.C. Cir. 1993); *American Message Ctrs. v. FCC*, 311 U.S. App. D.C. 64, 50 F.3d 35, 40 (D.C. Cir. 1995).

[121] *American Broad. Cos.*, 663 F.2d at 138; *Ad Hoc Telecomm's. Users Comm.*, 680 F.2d at 795; *MCI Telecomm's. Corp.*, 917 F.2d at 39.

[122] *American Broad. Cos.*, 663 F.2d at 138 (quoting *American Trucking Ass'n v. F.C.C.*, 126 U.S. App. D.C. 236, 377 F.2d 121, 127 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943, 87 S. Ct. 973, 17 L. Ed. 2d 874 (1967)).

[123] *Gelb v. AT&T Co.*, 813 F. Supp. 1022, 1029-31 (S.D.N.Y. 1993), *aff'd*, 138 F.3d 46 (2d Cir. 1998; *Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1171 (S.D.N.Y. 1996); see also *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 74 Cal. Rptr. 2d 55 (1998) (injunctive relief is permissible but "filed rate" doctrine bars any monetary recovery).

matter need not be referred to the FCC under the doctrine of "primary jurisdiction."

SUMMARY AND CONCLUSIONS

The King County Superior Court dismissed Appellants' complaint concluding the case was controlled by *Hardy v. Claircom Comm's. Group, Inc.*, and preempted by 47 U.S.C. sec. 332(c)(3)(A) and the doctrine of "primary jurisdiction." The ruling in Hardy principally involved the "filed rate" doctrine. AT&T cites "filed rate" doctrine cases in support of its position. In this case, however, AT&T as a commercial mobile radio service provider is specifically exempted from tariff filing requirements and thus those cases are not materially significant.

The language of Section 332 itself, contained in the "terms and conditions" clause, limits the preemptive reach of that provision. The savings clause, Section 414, is indicative of the intent of Congress to preserve state law claims for billing or advertising which do not attack market entry or rates charged by commercial mobile radio service (CMRS) providers.

The United States Supreme Court in *Nader v. Allegheny Airlines* concluded a challenge to a practice that is not governed by a tariff filing does not implicate the "conflict" inherent in contesting a practice or rate expressly regulated by an agency and that any impact on rates is "merely incidental." A court may award damages without it constituting rate making.

The doctrine of "primary jurisdiction" requires that a court refer issues within an agency's special expertise to the appropriate agency for an initial determination. Because Appellants' claims do not challenge the rates charged by AT&T nor any other technical practice requiring Federal Communications Commission (FCC) expertise, the matter falls

within the conventional competence of the courts without the need for referral to the FCC.

We reverse the judgment of the King County Superior Court which dismissed Appellants' class action complaint on a CR 12(b)(6) motion based upon federal preemption of state law claims under 47 U.S.C. sec. 332(c)(3)(A), the doctrine of "primary jurisdiction" and the Court of Appeals decision in *Hardy v. Claircom Communications, Inc.*

DURHAM, C.J., and DOLLIVER, GUY, JOHNSON, MADSEN, ALEXANDER, TALMEDGE and SANDERS, JJ., concur.

APPENDIX B

JUDGE J. KATHLEEN LEARNED

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CORYELLE TENORE, CHARLES F. PETERSON and KAREN M. COLE, on behalf of themselves and all others similarly situated, Plaintiff, v. AT&T WIRELESS SERVICES and McCAW CELLULAR COMMUNICATIONS, INC. d/b/a CELLULAR ONE, Defendant.	NO. 95-2-27642-3SEA ORDER OF DISMISSAL

This matter was brought on for hearing by Defendants' Motion to Dismiss Based on Federal Preemption of State Law Claims and the Doctrine of Primary Jurisdiction ("Defendants' Motion"). This Court has considered the Defendants' Motion and Reply in Support of that Motion together with all supporting pleadings or exhibits; Plaintiffs' Opposition to Defendants' Motion to Dismiss; Declaration of Erin K. Flory in Opposition to Defendants' Motion to Dismiss; Appendix of Documents in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss; Plaintiffs' Workpapers in Opposition to Defendants' Motion to Dismiss; the pleadings and papers on file with the Court; and the oral argument presented by the parties.

The Court concludes as a matter of law that this case is controlled by *Hardy v. Claircom* and therefore that the plaintiffs' state law claims are preempted by 47 U.S.C. § 332(c)(3)(A); and/or that the doctrine of primary jurisdiction requires that plaintiffs' claims be referred to the Federal Communications Commission. NOW, THEREFORE:

IT IS HEREBY ORDERED, DECREED AND ADJUDGED that plaintiffs' Complaint is hereby dismissed with prejudice.

DATED this 13th day of June, 1998.

/s/
Hon. J. Kathleen Learned

Presented by:

STOKES, EITELBACH
& LAWRENCE, P.S.

By /s/
Michael E. Kipling (#07677)
Laura J. Buckland (#16141)
Kelly Twiss Noonan (#19096)
Attorneys for Defendants

APPENDIX C

JUDGE J. KATHLEEN LEARNED

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CORYELLE TENORE, CHARLES F. PETERSON and KAREN M. COLE, on behalf of themselves and all others similarly situated, Plaintiffs, v. AT&T WIRELESS SERVICES and McCAW CELLULAR COMMUNICATIONS, INC. d/b/a CELLULAR ONE, Defendants.	NO. 95-2-27642-3SEA SECOND AMENDED CLASS ACTION COMPLAINT FOR BREACH OF CONTRACT, NEGLIGENT MISREPRESENTATION, COMMON LAW FRAUD, AND VIOLATION OF THE WASHINGTON CONSUMER PROTECTION ACT

Plaintiffs, by their attorneys, for their complaint allege upon personal knowledge and belief as to their own acts and upon information and belief as to all other matters, based upon investigation of counsel, as follows.

I. NATURE OF ACTION

1. This is a class action brought on behalf of a class of subscribers to AT&T Wireless ("AT&T") cellular services in AT&T's Northwest region. This region encompasses, in addition to the state of Washington, the states of Idaho, Utah, Oregon and Alaska. Members of the proposed class also include

former cellular subscribers with McCaw Cellular Communications d/b/a Cellular One ("McCaw"), who are no longer customers of Cellular One or who are now being provided service by AT&T as a result of the merger of McCaw and AT&T.

2. In order to induce cellular customers to use its cellular service, and/or in order to unfairly profit, defendants engaged, and in the case of AT&T are still engaging, in deceptive, fraudulent, misleading and/or unfair conduct arising from their practice of charging for a full minute of airtime even if a subscriber is connected for just one second. For example, if a subscriber to defendants' cellular service places a phone call that lasts for a total of one minute and one second, the subscriber is billed for two minutes. This billing practice, known in the cellular industry as "rounding" or "full minute billing," results in millions of dollars of excess billing by AT&T and McCaw all at the expense of the unwary customer. The practice of "rounding" is contrary to the "Service Agreement" that AT&T and McCaw enters into with many of its subscribers, which states that the customer is billed only from "*the time you press send until the time you press end.*" The Service Agreement does not disclose or permit rounding.

3. Rounding also means that cellular consumers do not get the full minutes they have contracted for at a fixed rate under their applicable service plan. All subscribers must choose between plans that offer a specified number of minutes of airtime, *e.g.*, 30, 60, or 100 minutes, for a fixed monthly rate, beyond which calls are billed at a specified per-minute rate. Rounding results in subscribers not receiving the full airtime for which they paid under their basic plan. For example, in a 30-minute plan, due to rounding, a consumer might actually receive only twenty minutes or less of actual airtime. AT&T conceals this from consumers and is at this moment continuing to promulgate advertisements to the effect that a consumer receives "30 local

minutes of airtime every month" for subscribing to the $29.99 monthly plan, when in fact, due to rounding, consumers do not receive 30 minutes of airtime.

4. Plaintiffs seek, individually and on behalf of the Class, injunctive and monetary relief, including (a) an order enjoining defendant AT&T from charging consumers based on the practice of rounding up without disclosing the practice; and (b) compensatory damages in the form of a refund of the difference between the amounts charged by AT&T and/or McCaw and the amount, if any, which cellular users would have incurred if AT&T and McCaw did not engage in this practice.

5. The practices complained of herein are of a universal nature and equally affect all members of the plaintiff Class.

6. Plaintiffs do not seek to change, diminish, or modify the rates being charged by AT&T or formerly by McCaw pursuant to filings, if any, with any governmental regulatory agency. Plaintiffs do not seek any relief which would disturb the uniformity of rates charged by AT&T.

II. JURISDICTION AND VENUE

7. The claims asserted herein arise under common law and the Washington Consumer Protection Act.

8. This Court has jurisdiction over the parties because plaintiffs submit to the jurisdiction of the Court, and defendants are headquartered in King County, Washington, are licensed or authorized to do business in King County, Washington, and/or have, within the relevant time periods, transacted business in King County, Washington. This Court has jurisdiction over the subject matter of the suit because the events complained of occurred in King County, Washington.

9. Venue is proper in this Court, pursuant to RCW 4.12.025, because defendants transact or have transacted business in King

County, Washington and maintain offices in King County, Washington.

III. THE PARTIES

10. Plaintiff Coryelle Tenore signed a service agreement with Cellular One and now has her service provided by AT&T. Her service was activated on January 15, 1995, and is for a one-year period.

11. Plaintiff Charles F. Peterson executed a subscription agreement for AT&T cellular services on July 15, 1995.

12. Plaintiff Karen M. Cole executed a subscription agreement for AT&T cellular services on September 26, 1995.

13. Defendant McCaw Cellular Communications, Inc. d/b/a Cellular One, until its merger with AT&T, was the largest seller of cellular services in the United States. It operated throughout the country under the name Cellular One. McCaw is headquartered in Kirkland, Washington. On information and belief, final approval for the false and/or deceptive and misleading service agreements, brochures, and advertisements at issue in the case was given by officials at McCaw's headquarters in King County, Washington.

14. Defendant AT&T Wireless is a wholly owned subsidiary of telecommunications giant AT&T Corporation and has its headquarters in Kirkland, Washington. On information and belief, final approval for the false and/or deceptive and misleading service agreements, brochures, and advertisements at issue in the case was given by officials at AT&T's headquarters in King County, Washington.

IV. CLASS ACTION ALLEGATIONS

15. Plaintiffs bring this action pursuant to Rules of Procedure 23(b)(1), (2) and 23(b)(3) on behalf of the following class:

All current and former AT&T and Cellular One subscribers in the states of Washington, Idaho, Utah, Oregon, and Alaska who have been billed for cellular service by AT&T or Cellular One and have been subject to having their airtime charges rounded up to the next full minute, when their service agreement or contract provided that they would be billed from "send to end" or contained similar language indicating that they would be billed only for actual airtime. The Class includes subscribers who originally contracted with McCaw Cellular d/b/a Cellular One but who became subscribers of AT&T when the two companies merged, and subscribers of Cellular One who did not become subscribers of AT&T. Excluded from the Class are all subscribers who were or are employees or officers of AT&T and McCaw.

16. Plaintiffs seek injunctive, compensatory and declaratory relief on behalf of the Class.

17. There are many thousands of members of the Class. AT&T and McCaw has or had revenues in the hundreds of millions of dollars as a result of cellular services. The exact number of members of the Class is presently unknown to plaintiffs but may be determined from records maintained by McCaw and AT&T as both send monthly bills to members of the proposed Class.

18. Plaintiffs are members of the Class. Plaintiffs' claims are substantially identical to and typical of the claims of members of the proposed Class.

19. Plaintiffs and plaintiffs' counsel (who are experienced in class action litigation) will fairly and adequately protect the interests of the Class.

20. Questions of fact and law common to the Class include, *inter alia*:

a. whether defendants have engaged and are engaging in the unlawful, deceptive, fraudulent, and/or misleading conduct alleged herein;

b. whether such conduct violates uniform state consumer protection laws and constitutes misrepresentation, fraud, and breach of contract;

c. whether injunctive relief is appropriate and, if so, what form of injunctive relief is most appropriate; and

d. whether plaintiffs and the members of Class have suffered damages as a result of the conduct alleged herein, and if so, the measure of such damages.

21. Defendants have acted and are acting on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole.

22. The common questions of fact and law predominate over any individual questions.

23. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

24. There are no unusual difficulties likely to be encountered in the management of this litigation as a class action. A class action is the only feasible method by which this controversy may be resolved.

25. Notice to the Class may be accomplished cheaply, efficiently and in a manner best designed to protect the due process rights of all Class members by means of written notices supplied as part of McCaw and AT&T's billing procedures.

V. BACKGROUND FACTS

26. Cellular phone service involves a recent technology of mobile radio communication based on a computer-coordinated series of cell sites situated throughout the coverage area. Each

cell site contains a radio transmitter which services a portion of the total coverage area. When a call is placed, the system locates the telephone, establishes a connection through the appropriate cell site and transfers that connection to other cell sites as the telephone moves through the area served by the system.

27. The FCC allocated radio frequencies for cellular services in a manner that allowed for only two cellular systems per market.

28. AT&T is a wholly owned subsidiary of AT&T Corporation and is organized to provide wholesale cellular service in markets serviced by landline carriers affiliated with AT&T. AT&T operates cellular services in virtually all states. In the Puget Sound region it is known as AT&T Wireless, and it includes consumers who were subscribers of McCaw Cellular d/b/a Cellular One, which is now a part of AT&T. Formerly, McCaw operated in numerous geographic regions, including the state of Washington.

29. The limitation of two cellular licenses per market has, unfortunately for consumers, created an immensely profitable oligopoly. Armed with oligopoly, if not monopoly, power, the cellular companies charge steep prices for airtime and feel free to engage in practices, like the ones described herein, that are inherently unfair to consumers.

30. Due to its immense profitability, cellular companies, like McCaw and AT&T, engage in extensive advertising designed to lure in cellular consumers and to induce use of cellular airtime.

31. AT&T (and formerly McCaw) offers consumers a range of billing plans. These plans offer a fixed charge for a specified period of airtime for both personal plans and business plans, *e.g.*, 30, 60 or 90 minutes per month for personal and 500 or 2,000 minutes per month for business plans. For any airtime

beyond the fixed-charge time allotted for each plan, the subscriber is charged at specified rates "per minute."

32. AT&T requires that each customer sign a "Service Agreement," which identifies the package the subscriber selected and constitutes the contract between AT&T and the subscriber. These contracts typically obligate the subscriber for a one or two-year period. McCaw had the same practice.

33. AT&T has the capacity to bill, as it does for its landline services in some circumstances, to the nearest I/ 10 of a minute, or even to the nearest second of airtime. McCaw also had this capacity.

34. When calculating airtime under any service agreement AT&T rounds up, as did McCaw. For example, if a caller places a call that uses one minute and one second of actual airtime, that caller is billed for two minutes. AT&T always rounds up to the full minute.

35. This practice contradicts the express terms of the Service Agreement of plaintiffs and the other members of the Class, which typically provide:

> **Billing and Payment of Charges....** For answered calls, airtime charges are from the time you press send until the time you press end. [] [Emphasis added, bold in original.]

36. As a result of defendants' practice, plaintiffs and other members of the Class have been overcharged, in that they (1) have not received the fixed-rate airtime allocated under their plan; (2) are not billed down or back to a full minute, but are billed only up or forward to the next highest full minute; and (3) are overbilled for airtime beyond the fixed-rate airtime provided for in their service plan.

37. As a result of this deceptive practice, AT&T takes in millions of dollars in additional charges to which, it is not entitled, and consumers overpay. McCaw also took in millions of dollars in excess charges.

38. AT&T customer service representatives, when questioned about this practice, admit that "it is confusing."

39. In brochures and advertising materials, AT&T routinely represents that the consumer is allowed so many "minutes" of airtime at a fixed monthly charge under the appropriate service plan and is billed thereafter on a per minute basis. McCaw followed the same practice. In fact, because of defendants' practice of "rounding," consumers have received less than their monthly allotment of minutes at the fixed charge. In addition, after exhausting their monthly allotment, they have paid more for additional time than what they would have paid if they were billed only for the minutes of airtime they actually used.

40. For example, when Cellular One would provide information to a prospective subscriber, the subscriber would typically receive a document describing the "Features" of the service plans. A typical brochure contains the following language:

Premier	Frequent user: over 6 calls per day	Digital	Analog
Monthly access		$109.99	$139.99
Minutes included		360	360
Free Premier Club Membership			
ADDITIONAL AIRTIME			
Peak		361-720 30¢	38¢
Retroactive over 721 *		26¢	22¢
Off-peak		5¢	22$
Pacific Northwest Network Roaming		▵30¢	75¢

Premier Club Membership benefits include free Voicemail, 10% off accessories, Personal Account Representative for 720+ users and other special offers.

* All minutes billed at lowest earned rate.

Standard	Average user: 2-5 calls per day	Digital	Analog
Monthly access		$69.99	$86.99
Minutes included		180	180
ADDITIONAL AIRTIME			
Peak		181-360 34¢	181+ 42¢
		361+ 30¢	42¢
Off-peak		10¢	23¢
Pacific Northwest Network Roaming		▵34¢	75¢

Occasional	Infrequent user: 0-1 calls per day	Digital	Analog
Monthly access		$24.99	$29.99
Minutes included		30	30
ADDITIONAL AIRTIME			
Peak		31-180 34¢	31+ 52¢
		361+ 30¢	52¢
Off-peak		15¢	25¢
Pacific Northwest Network Roaming		▵42¢	75¢

41. From the this "service plan," an average consumer would reasonably assume that she would receive all of the minutes specified in the second line of each of the foregoing tables for the fixed price. In addition, the consumer would also reasonably assume that, if she spoke for a total of 100 additional minutes, she would be charged only the per-minute rate multiplied by 100. As explained above, this is not the case.

42. AT&T continues to promulgate advertisements that have the capacity to mislead consumers as to the true nature of its charges. For example, in a full page color ad in the November 19, 1995 Seattle Times, AT&T advertised as follows:

A LOW $29.99 MONTHLY RATE

> AT&T cellular service costs just $29.99 per month on a one year contract.
>
> **30 MINUTES INCLUDED**
>
> You get 30 local minutes of airtime each month. So you can call more often.

(Bold in original.)

43. The foregoing advertisement and others like it are deceptive for failing to disclose the practice of rounding. Absent such disclosure the proclamation of "30 minutes included" is misleading and deceptive, because consumers do not get 30 minutes and may get as few as 16 minutes due to rounding.

FIRST CAUSE OF ACTION

Breach of Contract

44. Plaintiffs reallege each of the paragraphs above as if fully set forth herein.

45. Plaintiffs and members of the Class contracted for a prescribed amount of airtime and method of charging for airtime, *ie.*, that they would be billed from "Send to End." These were valid contracts. By engaging in the practice of rounding, defendants have breached these contracts, causing plaintiffs and members of the Class damage.

SECOND CAUSE OF ACTION

Negligent Misrepresentation

46. Plaintiffs repeat and reallege the foregoing paragraphs.

47. Defendants have negligently engaged in the deceptive practices, misrepresentations, and material omissions complained of herein in order to induce plaintiffs and members of the Class to incur charges for airtime they did not use. These misrepresentations, or omissions are contained in brochures

describing Cellular One's and AT&T's service plans, the service agreements, and other advertisements using language similar to that set forth above. Justifiable reliance by the classes should be presumed. To the extent McCaw and/or AT&T purports to have disclosed this practice in advertising and promotional brochures, such disclosures are inadequate and do not meaningfully disclose that (1) airtime under the basic service agreement is based on rounding; and (2) airtime after the basic plan time has been exhausted is based on rounding always to the next highest minute.

48. Plaintiffs and the members of the Class have been damaged as a result of the conduct complained of herein, and the harm or risk of harm is ongoing.

49. Defendants' conduct complained of herein renders it liable as a matter of common law in damages for the consequences of such conduct as well as for appropriate injunctive relief enjoining defendants' unlawful conduct and requiring full disclosure, as set forth in detail below.

THIRD CAUSE OF ACTION

Fraud Under Common Law

50. Plaintiffs repeat and reallege the foregoing paragraphs.

51. Defendants have knowingly, and with intent to induce reliance by the class, engaged in the deceptive practices, material misrepresentations, and material omissions complained of herein in order to induce plaintiffs and the members of the Class unknowingly to pay for airtime that they did not use. Justifiable reliance by the class should be presumed.

52. Plaintiffs and members of the Class have been damaged as a result of the conduct complained of herein, and the harm or risk of harm is ongoing.

53. Defendants' conduct complained of herein renders it liable as a matter of common law in damages for the consequences of such conduct as well as for appropriate injunctive relief enjoining defendants' unlawful conduct and requiring full disclosure, as set forth in detail below.

FOURTH CAUSE OF ACTION

Violation of the Washington Consumer Protection Act and Similar State Statutes

54. Plaintiffs reallege each of the paragraphs above as if fully set forth herein.

55. Plaintiffs' fourth cause of action is for violation of the Washington Consumer Protection Act, RCW 19.86.010 *et seq.* The Washington Consumer Protection Act should apply to protect all consumers in Washington, Idaho, Utah, Oregon, and Alaska because defendants located their headquarters in Washington, and, on information and belief, the false and/or deceptive representations or omissions of fact in defendants' contracts, brochures, and advertisements disseminated in these states were subject to final approval by defendants' Washington headquarters. The state of Washington has an important interest in ensuring that domestic corporations doing business with non-Washington residents fully comply with Washington laws.

56. Each state within the service area of AT&T and/or McCaw has a statute similar to the Washington Consumer Protection Act. To the extent the Court does not apply Washington's Consumer Protect Act to consumers outside of Washington, plaintiffs bring this claim on behalf of consumers in Idaho, Utah, Oregon, and Alaska asserting the equivalent of Washington's Consumer Protection Act for each such state.

57. Defendants' conduct complained of herein is an unfair act or practice that has the capacity to and does deceive consumers into believing that they are receiving a certain amount of basic airtime when this is not the case.

58. Defendants' conduct occurred in the conduct of trade or commerce or the sale of services.

59. The cellular service industry implicates public interest.

60. All the conduct alleged herein occurs and continues to occur in the course of defendants' business. Defendants' conduct is part of a pattern or generalized course of conduct repeated on thousands of occasions daily.

61. Plaintiffs and members of the Class have all been directly and proximately injured in their business and property by defendants' conduct complained of herein.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request, individually and on behalf of all members of the Class, as appropriate, against defendants, for the damages sustained by reason of each of the causes set forth above, an order providing as follows:

A. An accounting of all monies wrongfully received by defendant as a result of the conduct complained of herein;

B. Compensatory damages in an amount to be determined at trial;

C. Punitive damages in an amount to be determined at trial;

D. Penalties as provided under state Consumer Protection Acts;

E. Requiring defendant AT&T to provide adequate notice of the practice complained of herein and allowing consumers who get the notice to void their contracts with AT&T without penalty;

F. Any other injunctive relief the court deems appropriate;

G. Reasonable attorneys' fees, disbursements and costs of this action, including expert and accounting fees;

H. Such other favorable relief as this Court may deem just, equitable or proper.

DATED: Seattle, Washington
June 3, 1997.

HAGENS & BERMAN, P.S.

By /s/_____
Steve W. Berman, WSBA #12536
Sean R. Matt, WSBA #21972
1301 Fifth Avenue, Suite 2929
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APPENDIX D

FEDERAL CASES

D.C. Circuit

Alicke v. MCI Communications Corporation, No. 96-0517 (TPJ), U.S.D.C., D.D.C. [landline long distance]

First Circuit

Casper v. Southwestern Bell Mobile Systems, No. 1:95cv12712, U.S.D.C., D. Mass. [wireless]

Smilow v. Southwestern Bell Mobile Systems, No. 1:97-cv-10307-REK, U.S.D.C., D. Mass. [wireless]

Second Circuit

Birnbaum v. Sprint Communications Company, L.P., No. 96-CV-2514, U.S.D.C., E.D.N.Y. [landline long distance]

Marcus v. AT&T Corp., No. 96-9244, U.S.D.C., S.D.N.Y. [landline long distance]

Moss v. AT&T Corp., No. 96-9256, U.S.D.C., S.D.N.Y. [landline long distance]

Third Circuit

Opalka v. AWACS , Inc., d/b/a Comcast Metrophone (In re Comcast), No. 2:96-cv-02418, U.S.D.C., E.D. Pa. [wireless]

Fifth Circuit

Esquivel v. *Southwestern Bell Mobile Sys.*, No. 95-99, U.S.D.C., S.D. Tex. [wireless]

Pepper v. BellSouth Corporation, No. 3:95-CV-851LN, U.S.D.C., S.D. Miss. [wireless]

Simons v. GTE Mobilnet, Inc., No. H-95-5169, U.S.D.C., S.D. Tex. [wireless]

Seventh Circuit

Cahnmann v. Sprint Corporation, No. 96 C 5129, U.S.D.C., N.D. Ill. [landline long distance]

Ninth Circuit

Smith v. Sprint Communications Co., L.P., No. C96-2067-FMS, U.S.D.C., N.D. Cal. [wireless]

Eleventh Circuit

Brunson v. AT&T Corp., No. 1:96cv01010, U.S.D.C., S.D. Ala. [wireless]

Goforth v. Cellular One, Inc., No. 98-289-CIV-FTM-24D, U.S.D.C., M.D. Fla. [wireless]

Haughton v. Sprint International Communications Co., No. 7:96cv00230, U.S.D.C., N.D. Ala. [wireless]

Ponder v. GTE Mobilnet, No. CV-95-1046-JH, U.S.D.C., S.D. Ala. [wireless]

White v. GTE Mobilnet, Inc., No. 8:97cv01859, U.S.D.C., M.D. Fla. [wireless]

STATE CASES

District of Columbia

Bootel v. MCI Telecommunications Corp., No. 95-8270, Superior Ct. of the District of Columbia [landline long distance]

Alabama

Bennett v. Alltel, No. 96-D-232, Circuit Court of Montgomery County [wireless]

Lee v. Contel Cellular of the South, Inc., No. CV-95-004367, Circuit Court of Mobile County [wireless]

Mann v. Cellular One, No. CV-95-8579, Circuit Court of Jefferson County [wireless]

Moulton v. Alltel, No. 96-D-89-N, Circuit Court of Montgomery County [wireless]

Mobley v. AT&T Corp., No. 25895, Alabama Public Service Commission [landline long distance]

Arkansas

Maddox v. Alltel Mobile Communications of Arkansas, Inc., No. 98-776, Circuit Court of Saline County [wireless]

California

Ball v. GTE Mobilnet of California Limited Partnership, No. 98AS03811, California Superior Court, Sacramento County [wireless]

California Wireless Resellers Association v. Los Angeles Cellular Telephone Company, No. 98-06-055, California Public Utilities Commission [wireless]

Cohen v. AirTouch Cellular Inc. Los Angeles SMSA, No. 972438, California Superior Court, San Francisco County [wireless]

Day v. AT&T Corp., Nos. 976391/976617, California Superior Court, San Francisco County [wireless]

Hagen v. America Online, Inc, No. 971047, California Superior Court, San Francisco County [internet]

Landin v. Los Angeles Cellular Telephone Company, No. BC143305, California Sup. Ct., Los Angeles County [wireless]

Nova Cellular West, Inc. v. AirTouch Cellular of San Diego, No. 98-02-036, Cal. Public Util. Comm'n [wireless]

Powers v. AirTouch Cellular, No. N71816, California Superior Court, North County Branch of San Diego [wireless]

Ross v. Pacific Bell, No. 974081, California Superior Court, San Francisco County [landline long distance]

Delaware

First M. Corp. v. America Online, Inc., No. 14476, Court of Chancery, New Castle [internet]

Sanderson v. AWACS, Inc., d/b/a Comcast Metrophone, No. 96C-02-225, Del. Sup. Ct., New Castle County [wireless]

Florida

Goforth v. Cellular One, Inc., No. 98-3623 CA-RWP, Circuit Court of the 20th Judicial District, Lee County [wireless]

Georgia

Griffin v. AirTouch Cellular of Georgia, No. E55480 Q19/140, Superior Court of Georgia, Fulton County [wireless]

Saba v. AirTouch Cellular of Georgia, No. E56074, Superior Court of Georgia, Fulton County [wireless]

Sharple v. AirTouch Cellular of Georgia, No. E55480, Superior Court of Georgia, Fulton County [wireless]

Smith v. AirTouch Cellular of Georgia, No. E56092, Superior Court of Georgia, Fulton County [wireless]

Illinois

Penrod v. Southwestern Bell Mobile Sys., Inc., No. 96-L-132, Circuit Ct., Third Jud. Dist., Madison County [wireless]

Indiana

Rogers v. Westel-Indianapolis Company, d/b/a Cellular One, No. 49D03-9602-CP-0295, Marion Superior Court [wireless]

Missouri

Halper v. Sprint, No. CV95-22815, Circuit Court of Jackson County, Missouri and Kansas City [wireless]

New Jersey

Carroll v. Bell Atlantic (In re Cellco Consumer Litigation), No. AM-001316-96T3, New Jersey Superior Court, Camden County [wireless]

DeCastro v. AWACS, No. L-1715-96, New Jersey Superior Court, Camden County [wireless]

Kathuria v. Comcast Cellular One, No. L-5079-95, New Jersey Superior Court, Middlesex County [wireless]

Kuhn v. Bell Atlantic (In re Cellco Consumer Litigation), No. AM-001303-96T3, New Jersey Superior Court, Camden County [wireless]

Weinberg v. Sprint Corporation, No. BER-L-12073-95, New Jersey Superior Court, Bergen County [landline long distance]

New York

Porr v. NYNEX Corporation, No. 96-526, Supreme Court of the State of New York, Westchester County [wireless]

Roman v. Bell Atlantic NYNEX, No. 604150/96, Supreme Court of the State of New York, New York County [wireless]

Tolchin v. Bell Atlantic, No. 17136/97, Supreme Court of the State of New York, Kings County [wireless]

North Carolina

Mandell v. Bell Atlantic NYNEX Mobile, No. 97-CV5-6528, North Carolina Sup. Ct., Mecklenburg County [wireless]

Ohio

Kuns v. 360° Communications Co., No. 96-CV-196, Court of Common Pleas, Erie County, Sandusky [wireless]

Pennsylvania

Pennsylvania Bancshares v. Motorola, Inc., No. 95-19136, Court of Common Pleas, Montgomery County [wireless]

Tennessee

Hagy v. Sprint Cellular, No. 6348, Chancery Court for Washington County [wireless]

Texas

Purkey v. GTE, District Court of Jasper County [wireless]

Sommerman v. Dallas SMSA Limited Partnership, No. 96-02150, District Court of Dallas County [wireless]

Winston v. GTE Communication Sys. Corp., No. 95-58377, District Court of Harris County [wireless]

Washington

Hardy v. Claircom Communications Group, Inc., No. 96-2-00574-6, King County Superior Court [airplane telephone]

Lair v. GTE Airfone, No. 96-2-00575-4, King County Superior Court [airplane telephone]

Lair v. US West New Vector, No. 95-2-26309-7 SEA, King County Superior Court [wireless]

Tenore v. AT&T Wireless Services, No. 95-2-27642-3 SEA, King County Superior Court [wireless]

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

PATRICK SIMONS, SHEILA FAY, AND JAMIL ELIAS, on behalf of themselves and all others similarly situated in the United States, Plaintiffs, vs. GTE MOBILNET, INC., Defendant	CIVIL ACTION NO. H-95-5169

ORDER OF DISMISSAL

Pending before the Court in the above referenced action, challenging the liquidated damages provision imposing an early termination charge in Defendant GTE Mobilnet, Inc.'s cellular telephone contracts as void because it is an illegal penalty, are Defendant's incorporated Rule 12 motion for judgment on Plaintiffs' first amended original complaint (instrument §29) and

Plaintiffs Patrick Simons, Sheila Fay, and Jamil Elias' unopposed[1] motion for leave to amend (instrument §30).

Defendant moves for dismissal for failure to state a claim under Fed. R. Civ. P. 12(b) or 12(c). Defendant emphasizes that it is not a party to any of the customer service agreements ("CSAs"),[2] containing the disputed early termination clauses, made with any Plaintiffs. Rather the proper defendants, if any, are GTE Mobilnet Service Corporation's affiliates and subsidiaries that are licensed to provide cellular services in Plaintiffs' "primary service areas." Defendant was merely acting as the agent of these principals in entering into the CSAs. Moreover, argues Defendant, Plaintiffs Fay and Elias have not

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[1] According to the certificate of conference included in the motion, Defendant does not oppose the motion but reserve its right to file a supplemental motion to dismiss based upon new allegations in the Second Amended Original Complaint.

[2] Each Plaintiffs' CSA contains the following clause:

> PARTIES: This Agreement is made by GTE Mobilnet Service Corporation, on behalf of its affiliates and subsidiaries, (GTE) *as agent* or reseller *of the cellular network operator (licensee) licensed by the Federal Communications Commission* to serve Customers' primary service area and the individual or organization (Customer) identified on the front of this Agreement [emphasis added].

Defendant points out that documents attached to a Rule 12 (b) action to dismiss that are indisputably authentic and on which the plaintiff's claims are based may be considered by the court. *Pension Benefit Guaranty Corp. v. White Consolidated Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 687 (1994); *Venturo Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993); *Sheppard v. Texas Dept. of Transp.*, 158 F.R.D. 592, 595-96 (E.D. Tax. 1994).

alleged any actual injury,[3] since they are members of their purported Sub-class A that have paid no fees, and therefore have not raised a case or controversy as required by Article III, Section 2, Clause 1 of the United Stated Constitution. As a result this court lacks subject matter jurisdiction over their claims. *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974); *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). They must also allege damage or actual injury under section 206 of the Communications Act of 1934, 47 U.S.C. sections 151 *et seq.* (the "Federal Communications Act" or "FCA"), and a failure to do so constitutes a fatal pleading defect. Furthermore, Defendant asserts that Plaintiff Fay and Elias are not adequate class representatives because Rule 23(b)(3) requires putative class members to have suffered actual damages. Finally, regarding Plaintiffs' complaint that Defendant's practices are "punitive" under section 206 and therefore "unreasonable" under section 201(b) because they violated the Texas common law of the liquidated damages, Defendant characterizes it as an improper "attempt to usurp Congress's intent to preempt state law under the FCA, and thereby effectively 'nationalize' Texas common law through this purported nationwide class action." Defendant's Incorporated Rule 12 Motion as 3. Plaintiffs' effort to "shoehorn" the Texas common law of liquidated damages into the FCA and use the FCA to nationalize Texas common law is improper. *Franchise Tax Bd. v. Construction Laborers Vac. Trust*, 463 U.S. 1, 23-24 (1983) (*citing Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968)) ("if a federal cause of action completely preempts a state cause of

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[3] Plaintiffs assert that they satisfy requirements under Fed. R. Civ. P. 23(b)(3) for two sub-classes: (1) Sub-class A for customers who have not paid an early termination fee and (2) Sub-class B for those who have paid within four years prior to July 13, 1995. Defendant maintains that members of Sub-class A, which includes Plaintiffs Fay and Elias, have not been damaged because they have not paid any early termination fee.

action any complaint that comes within the scope of the federal cause of action necessarily arises under the federal law"). Defendant emphasizes that there is no evidence of any congressional intent to incorporate the Texas common law of liquidated damages into the FCA. Furthermore Plaintiffs' effort to do so conflicts with the standard of the reasonableness governing the conduct of the common carriers in section 201(b), and allowing state law to interfere with the FCA's regulatory scheme is improper. *Cellular Dynamics, Inc. v. MCI Telecommunications Corp.*, No. 94 C 3126, 1995 WL 221758 (N.D. Ill., April 12, 1995). Cellular carriers' rates and practices are governed exclusively by section 201(B), and Congress has expressly and completely preempted the entire field of rate regulation under section 332(C)(3)(a), making Texas common law irrelevant.

Plaintiffs respond conclusorily that Defendant is a party to the CSAs with the named Plaintiffs and that their First Amended Original Complaint alleges facts sufficient to show that the termination fee provision in those contracts constitutes an unreasonable practice under the FCA. They read the "PARTIES" provision in the CSAs as demonstrating that customers are contracting with the cellular network operator licensed by the Federal Communications Commission, which they assert "upon [unidentified] information and belief" is the Defendant. Even if the Defendant is not the cellular network operator, Plaintiffs argue that there is nothing in the CSAs to evidence that fact and that Defendant's contention that it is not is insufficient to controvert their allegations. They also point to Defendant's registered trademark printed at the top of the front page of each CSA. As for a justiciable controversy, Plaintiffs state that they have deleted their claim for declaratory relief from their proposed Second Amended Original Complaint, attached to their unopposed motion for leave to amend.

Plaintiffs motion for leave to amend indicated that the Second Amended Original Complaint deletes the requests for certification of a national class and requests only certification of a Texas class of individuals similarly situated with the named plaintiff class representatives.

This Court agrees with Defendant that the "PARTIES" provision indicates that it acted as an agent for its affiliates and subsidiaries and that it is not a licensed cellular network operator for purposes of the CSAs. Therefore it is not a proper defendant here. Furthermore because Plaintiffs Elias and Fay have not paid an early termination fee, all their claims, not just their claim for declaratory judgment, must be dismissed for lack of subject matter jurisdiction because they have suffered no injury, have no justiciable controversy, and lack standing to pursue this suit. In addition, regardless of whether the proposed class is nationwide or only Texas-wide, all state law claims related to the field of rate regulation are completely preempted by section 332(c)(3)(A) of the FCA and Texas law as a standard for unreasonable practices is irrelevant. Moreover Plaintiffs' proposed amendment will not save these fatal pleading defects.

Accordingly, the Court

ORDERS that Plaintiffs' motion for leave to amend is DENIED because amendment is futile and that Defendant's motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12 is GRANTED.

SIGNED at Houston, Texas, this 11th day of April, 1996.

/s/

MELINDA HARMON

UNITED STATES DISTRICT JUDGE

APPENDIX F

TENTATIVE RULINGS
Department 53
Sacramento Superior & Municipal Courts
800 H Street
JOHN R. LEWIS, JUDGE
S. SLOCUMB, Clerk
T. MULLENIX, Bailiff
November 17, 1998, 09:00

. . . .

ITEM 9 98AS03811 SUSANNE BALL, ET AL V. GTE MOBILNET OF CA LTD, ET AL

* JNP * Nature of Proceeding: DEMURRER
Filed by: POULOS, JOHN S.

The joinders are granted. The demurrers of all demurring defendants are SUSTAINED without leave to amend on the ground the Federal Communications Act preempts all state regulatory authority over wireless service rates. Plaintiffs are not without a remedy; they may seek a remedy before the FCC or in federal court.

Plaintiffs seek injunctive relief and damages for various practices of the defendants which plaintiffs allege are violative of Business and Professions Code section 17200. These practices are (1) "rounding up" in which a full minute is charged for a part of a minute used, (2) "send to end" which includes charging for nonconversation time, (3) charging for ringing time for complete calls but not for incomplete calls, (4) charging full rates for incomplete calls, and (5) charging for "lag time." Plaintiffs assert that their challenges are not about rates; rather, they relate to billing practices and nondisclosure of such practices. The argument is interesting, but the court is not persuaded by it. The cases relied upon by Plaintiffs are readily

distinguishable. The reasoning of the Federal District Court in the case of In re Comacast [sic] Cellular Telecommunications Litigation, a case which is legally and factually very similar to this one, is here apposite. The plaintiffs in Comcast also attacked the fairness of charges for noncommunication time. The court considered this to be more than just a challenge to billing practices (not necessarily preempted) and noted that plaintiffs were attacking the "reasonableness of the method by which Comast calculates length and consequently the cost of a cellular telephone call. As such, the plaintiff' [sic] claims present a direct challenge to the calculation of the rates charged by Comcast . . . ." The court went on to state "While none of these claims pose an explicit challenge to the rates charged by Comcast for cellular phone service, a careful reading of the complaint and the remedies sought by the plaintiffs demonstrates that the true gravamen of the complaint is a challenge to Conmcast's [sic] rates and billing practices."

Plaintiffs' exploring of a distinction between intrastate and interstate service providers offers no meaningful support to Plaintiff's position. Such a distinction has no relevance to the issue of preemption here. Neither does the Court find persuasive on the issue of preemption Plaintiffs' commentary regarding the "filed rate" doctrine.

This minute order is effective immediately. No formal order pursuant to Rule 391 or further notice of this order is required.

APPENDIX G

STATE OF INDIANA)		IN THE MARION SUPERIOR COURT CIVIL DIVISION, ROOM THREE
	) SS:	
COUNTY OF MARION)		CAUSE NO. 49D03-9602-CP-0295

JOHN M. ROGERS, on behalf of himself and all other similarly-situated parties,

Plaintiff,

vs.

WESTEL-INDIANAPOLIS COMPANY d/b/a CELLULAR ONE,

Defendant.

ORDER

Oral argument by attorneys Mark Rutherford for the Plaintiff and Richard Beckler, Larry Wallace, and Michael Goggin for Defendant, was heard on June 12, 1996. The Court having considered the oral argument and having reviewed the pleadings, briefs, supplemental authorities and responses thereto, now FINDS and ORDERS:

1. Westel's Motion to Stay Portions of Its Motion to Dismiss the Complaint, filed May 17, 1996, is hereby granted.

2. In deciding Westel's motion to dismiss the complaint, filed February 5, 1996, the Court considered only the issues of whether Mr. Rogers' claims are preempted by federal statute and whether Mr. Rogers' complaint should be dismissed under the doctrine of primary jurisdiction.

3. In deciding Westel's motion to dismiss, the Court did not consider Exhibits B and C of Westal's brief.

4. The remedy requested by Plaintiff will in fact require a change of rates and therefore *this* Court does not have jurisdiction. The Court finds that jurisdiction rests with the Federal Communications Commission and/or the federal court, per federal statute.

- THEREFORE, the Defendant's Motion to Dismiss for lack of jurisdiction is granted.

SO ORDERED, ADJUDGED AND DECREED THIS 1 DAY OF JULY 1996.

/s/

Patrick L. McCarty, Judge
Marion Superior Court
Civil Division, Room 3

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APPENDIX H

Number	Clerk		Reporter	
N71816	KARYN STOKKE		TELEPHONIC P.O. BOX 128, SAN DIEGO, CA 921124104	
Date of Hearing	Time of Hearing	Date Complaint Filed	Judge	Dept
10/06/97	02:00 PM	06-25-96	KENNETH O. ZIEBARTH	H
Plaintiff/Petitioner			Defendant/Respondent	
DAVID POWERS			AIRTOUCH CELLULAR	
Attorney for Plaintiff/Petitioner			Attorney for Defendant/Respondent	
ALEXANDER M. SCHACK			DOUGLAS R. TRIBBLE (1)	

1. DEFENDANT DEMURRER

THIS MATTER HAVING COME BEFORE THE COURT THIS DATE, THE COURT ORDERS:

DEFENDANT'S GENERAL DEMURRER TO THE ENTIRE SECOND AMENDED COMPLAINT BASED ON FEDERAL PRE-EMPTION PURSUANT TO 47 U.S.C. § 332(c)(3)(A) IS SUSTAINED WITHOUT LEAVE TO AMEND. CONGRESS HAS MADE CLEAR IN THIS CODE SECTION ITS INTENT TO PRE-EMPT ALL STATE REGULATION OF RATES CHARGED FOR CELLULAR SERVICE.

DESPITE THE AMENDMENTS TO THE COMPLAINT, PLAINTIFFS' ACTION IS STILL A CHALLENGE TO DEFENDANT'S PURPORTED OVERCHARGES IN

RATES. FOR EXAMPLE, IN PARAGRAPH 18 OF THE THIRD AMENDED COMPLAINT, PLAINTIFF ALLEGES THAT IT HAS BEEN DAMAGED BY DEFENDANTS [SIC] "METHODS OF DETERMINING OR CALCULATING THE QUANTITY OF CHARGEABLE AIRTIME USAGE" WHICH HAS CAUSED PLAINTIFF DAMAGE IN THAT IT HAS HAD "TO PAY FOR LARGER QUANTITIES OF CELLULAR TELEPHONE SERVICE THAN . . . ACTUALLY USED". SIMILAR LANGUAGE IS CONTAINED IN THE REQUEST FOR INJUNCTIVE RELIEF CONTAINED IN MANY CAUSES OF ACTION (SEE PARAGRAPHS 41, 50, 56, 61, AND 71).

THESE ALLEGATIONS DO NOT FOCUS ON DEFENDANT'S ALLEGED FAILURE TO DISCLOSE THE "TEARDOWN TIME" CHARGE, BUT ON THE LEGALITY OR REASONABLENESS OF SUCH CHARGES. PLAINTIFFS [SIC] ALLEGATIONS CONSTITUTE DIRECT CHALLENGES TO THE CALCULATION OF THE RATES CHARGES BY DEFENDANT AIRTOUCH FOR CELLULAR TELEPHONE SERVICE AND THUS, THE ACTION IS EXPRESSLY PREEMPTED. (SEE *IN RE COMCAST CELLULAR TELECOMMUNICATIONS LITIGATION*, 949 F.SUPP. 1193 (E.D. PA. 1996, A COPY OF WHICH IS LODGED AS DEFENDANT'S EXHIBIT E.)

THIS RULING DISPOSES OF THIS MATTER IN ITS ENTIRETY.

DATED: 10/06/97

/s/

JUDGE OF THE SUPERIOR COURT

APPENDIX I

ORDER ON MOTION

LARRY	SUPERIOR COURT OF
CARROLL ETC	NEW JERSEY
V.	APPELLATE DIVISION
CELLCO	DOCKET NO. AM-001316-96T3
PARTNERSHIP	MOTION NO. M-006515-96
	BEFORE PART: K
	JUDGE(S): SHEBELL
	DREIER

MOTION FILED:	JUNE 02, 1997
BY:	CELLCO PARTNERSHIP
ANSWER(S) FILED:	JUNE 19, 1997
BY:	LARRY CARROLL
SUBMITTED TO COURT:	JUNE 23, 1997

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 25TH DAY OF JUNE, 1997, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT -- FOR LEAVE TO APPEAL:

GRANTED	DENIED	OTHER
( )	(X)	(X)

SUPPLEMENTAL: We are satisfied that plaintiffs' action is primarily grounded on allegations of fraud and consumer protection and not rate setting. We expect that the trial judge will recognize the limits of jurisdiction as reserved to the States under the "savings clause" of 47 U.S.C. § 332(c)(3)(A), and that,

therefore, rates will not be directly impacted.

-9435-96

FOR THE COURT:

/s/

THOMAS F. SHEBELL JR, P.J.A.D.

APPENDIX J

Decision 98-09-037 September 3, 1998
BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Nova Cellular West, Inc. dba San Diego Wireless, Complainant, vs. AirTouch Cellular of San Diego, Defendant.	Case 98-02-036 (Filed February 13, 1998)

OPINION

Summary

Nova Cellular West, Inc. (Nova), a cellular reseller operating in the San Diego area, complains that AirTouch Cellular (AirTouch) refuses to supply it with four promotional plans at lower rates that would reflect electronic billing efficiencies. AirTouch moves to dismiss on grounds that the Commission lacks jurisdiction to adjudge the lawfulness of rates charged by cellular telephone carriers. The motion is granted. The complaint is dismissed.

Nature of Complaint

On February 13, 1998, Nova filed this complaint against "AirTouch Cellular of San Diego,"[1] depositing $37,930.70 in disputed billing amounts with the Commission. Nova filed an amended complaint on March 12, 1998, depositing an additional $17,291.74 with the Commission. On June 12, 1998, Nova filed a second amended complaint that increased the amount of

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[1] Defendant's name is incorrectly stated in the complaint. AirTouch Cellular (U-3001-C) is the cellular operator in the San Diego market and has submitted an answer and a motion to dismiss.

disputed funds deposited with the Commission to $95,689.39. Nova is a customer of AirTouch's cellular service; Nova purchases AirTouch cellular service in volume and resells that service to the public.

Nova alleges that AirTouch refuses to make four promotional access and airtime plans available to Nova at lower rates that would reflect an electronic billing format. While the service packages are available for resale, Nova alleges that the cost to it is higher because none of the packages includes the billing format that creates administrative cost savings. Nova asks the Commission to enjoin AirTouch from continuing to bill and collect from Nova for charges other than under the noted rate plan or such other more favorable plan, and to remove a total of $95,689.39 that Nova alleges was improperly assessed since November 1997.

AirTouch admits the facts of the complaint. It states that its billing system can, for certain rate plans, generate a billing tape in a format that allows a reseller to economically generate bills for the reseller's customers. AirTouch states that it also offers other rate plans, many of them with short-term promotional discounts, and that AirTouch is not able to develop billing tapes in that same format for these rate plans. AirTouch states that resellers may purchase service under these special rate plans, but that they must accept the terms, conditions and service limitations of these plans, including the number of options for the format of bills or billing tapes.

Procedural History

This case was filed on February 13, 1998. Notice of the filing appeared in the Commission's Daily Calendar on February 26, 1998. On March 2, 1998, defendant was instructed to answer the complaint within 30 days. The instructions, a copy of which was served on complainant, assigned the matter to Administrative Law Judge Walker and categorized the case as an adjudicatory proceeding,, as that term is defined in Rule 5(b) of the Rules of Practice and Procedure. Because we have decided to dismiss the complaint on the basis of defendant's motion to dismiss, no scoping memo is necessary, nor is a hearing required. As noted in the instructions to answer, a hearing is not required where the matter "is otherwise resolved by the parties," *i.e.*, through pleadings addressing the motion to dismiss. The categorization of this matter as adjudicatory has not been contested by the parties.

Motion to Dismiss

AirTouch on April 15, 1998, filed a motion to dismiss the complaint. Nova responded to the motion of April 30, 1998. AirTouch moves for dismissal on grounds that (1) this Commission lacks subject matter jurisdiction because the complaint deals with rates charged to a reseller; (2) a similar complaint regarding another AirTouch rate plan was the subject of a 1997 settlement agreement between the parties that purportedly barred subsequent complaints of this nature,[2] and (3) the complaint fails to state a claim upon which relief can be granted. For the reasons set forth below, we agree that the Commission is without jurisdiction to address the rate practices alleged in this complaint, and that such enforcement must be left instead to the Federal Communications Commission (FCC) and to the federal courts. Accordingly, the motion to dismiss for

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[2] *See* Decision (D.)97-05-100, dismissing with prejudice Nova's complaint in Case 96-12-027. A copy of the parties' settlement agreement in that case is attached to AirTouch's motion to dismiss.

lack of jurisdiction is granted. Because of this decision, we do not reach the other grounds for dismissal.

Discussion

In recognition of the rapid growth of the wireless telecommunications services industry, Congress in 1993 amended the Communications Act of 1934, 47 U.S.C. §§151 et seq., as amended, to provide a uniform federal regulatory framework for all commercial mobile radio services.[3] Pursuant to its stated goals of regulatory uniformity and deregulation of the industry, Congress amended Section 332 of the Act to provide:

> "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a state from regulating the other terms and conditions of commercial mobile services." (47 U.S.C.A. §332(c)(3)(A).)

On August 8, 1994, as authorized by the Act, the Commission filed a petition with the FCC to continue the Commission's jurisdiction over the rates of cellular carriers for an 18-month period. On May 19, 1995, the FCC released its report and order denying the petition and, on June 8, 1995, the Commission announced that it would not appeal the FCC's denial.[4]

Consequently, this Commission lacks jurisdiction to hear complaints regarding the lawfulness of rates charged by cellular

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[3] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 387-97 (1993).

[4] On June 22, 1995, the Cellular Resellers Association sought reconsideration of the FCC's denial. The FCC denied the petition for reconsideration in an order issued on August 8, 1995.

carriers. As the Commission itself has concluded with respect to cellular and other commercial mobile service carriers, "we will not entertain disputes regarding the level or reasonableness of any rate."[5]

Nova argues that its complaint does not involve rate regulation, but is instead a dispute over a billing practice. It states that, based on an FCC interpretation, the Commission may continue to decide complaints relating to "customer billing information and practices and billing disputes and other consumer matters."[6]

While we agree that the Commission retains authority to handle consumer complaints in matters of cellular nonrate terms and conditions of service,[7] the Commission does not have authority to enjoin AirTouch from billing and collecting the rates at issue here, which is the remedy sought by Nova. Indeed, Nova asks the Commission to order AirTouch to adjust

---

[5] *Investigation on the Commissions's Own Motion Into Mobile Telephone Service and Wireless Communications*, D.96-12-07 , at 23 (December 20, 1996). A number of judicial authorities support this view. *See In re Comcast Cellular Telecom. Litigation* (E.D.Pa. 1996) 949 F.Supp. 1193 ("any state regulation of [a cellular carrier's rate practices] is explicitly preempted under the terms of the Act."); *Lee, et al. v. Contel Cellular of the South* (S.D.Ala. 1996) 1996 U.S.Dist. LEXIS 19636 (state court action preempted as to "rounding" practice in calculating cellular charges).

[6] *In the Matter of the Petition of the People of the State of California and Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates*, FCC 95-195. PR Docket No. 94-105 (May 19, 1995), para. 145.

[7] *See* D.96-12-71, Conclusion of Law 10: "The Commission shall continue to monitor the structure, conduct and performance of CMRS carriers, and to handle CMRS consumer complaints, ensuring that facilities-based carriers not restrict in any manner, by way of nonrate terms and conditions, the ability of resellers to purchase or resell cellular or other telecommunications services to the public."

its rates to eliminate approximately $96,000 in charges to Nova. These requested actions would involve the Commission in ratemaking for cellular telephone services, an activity in which the Commission has been preempted. Consequently, the complaint must be dismissed.

Comments on Draft Decision

At the direction of Assigned Commissioner Neeper, parties were given the opportunity to comment on the draft decision in this matter. Both complainant and defendant filed comments on August 14, 1998.

Complainant argues that its complaint seeks to require AirTouch to provide it with electronic billing tapes for four promotional rate plans, and that this constitutes a billing dispute, over which this commission has jurisdiction, rather than a dispute as to rates. It notes that the Commission, in discussing federal preemption in D.96-12-071, stated that preemption would not apply to "eligibility for rate plans" and "scope of service within each rate plan." (D.96-12-071, at 14.) Complainant asserts that those are the issues here. It cites the case of *GTE Mobilnet v. New Par, et al.* (6th Cir. 1997) 111 F.3d 469, as standing for the proposition that alleged discriminatory treatment against cellular resellers under state law is not unequivocally preempted by the FCC.

Defendant argues that the complaint asks the Commission to direct AirTouch to offer Nova particular rates, namely the price made available in certain promotional rate plans to which Nova does not subscribe. Further, defendant states, the complaint asks the Commission to return to Nova the amount Nova alleges was unlawfully assessed, in effect changing *post hoc* the rates AirTouch charged to Nova. Defendant asserts that this type of state commission involvement in cellular rate regulation is prohibited by Section 332(c)(3) of the Communications Act. As to Nova's claim that it seeks only mandatory provisioning of a billing format, defendant cites recent dicta of the United States Supreme Court

stating that "[r]ates,...do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates [or for discriminatory rates] can be couched as a claim for inadequate services and vice versa."[8]

We agree with defendant that the relief requested by complainant requires ratesetting and that the Commission lacks jurisdiction to set cellular rates. The Commission, however, does retain authority over other terms and conditions of cellular service. In this case, mandating that AirTouch provide particular services at given rates is functionally identical to requiring AirTouch to provide its given services at particular rates. Both actions would constitute "rate regulation," and neither remedy is permitted under Section 332. The Sixth Circuit's decision in *GTE Mobilnet* is distinguishable, in that the issue there was whether a federal court should abstain from enjoining state commission action on the basis of preemption out of deference to the ability of the commission and state courts to deal with that question. The Sixth Circuit held that federal abstention was appropriate. As to D.96-12-071, the Commission in Conclusion of Law 10 states that it will continue to monitor restrictive practices of cellular carriers as to "nonrate terms and conditions." (D.96-12-071, at 32.) The undisputed facts of this case make clear that the relief is ratemaking, and therefore is preempted. Complainant should seek its relief before the FCC when its complaint involves AirTouch practices that would require a change in rates.

Findings of Fact

1. Complainant alleges that defendant assesses unlawful rates for at least four cellular service packages.

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[8] *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.* (June 15, 1998) ___ U.S. ___, 118 S.Ct. 1956.

2. Defendant has moved to dismiss the complaint for lack of jurisdiction.

Conclusions of Law

1. Congress in 1993 amended the Communications Act of 1934 to preempt state and local rate regulation of cellular telephone carriers.

2. The gravamen of the complaint is that rates for four AirTouch cellular plans available to complainant are unreasonable in that they do not include an electronic billing format.

3. The Commission has been preempted from prescribing rates for cellular telephone service.

4. The motion to dismiss the complaint for lack of subject matter jurisdiction should be granted.

5. Monies deposited by complainant pending resolution of this matter should be disbursed to defendant.

ORDER

IT IS ORDERED that:

1. The motion of AirTouch Cellular (AirTouch) to dismiss the complaint of Nova Cellular West, Inc., dba San Diego Wireless (Nova), for lack of subject matter jurisdiction is granted.

2. The complaint is dismissed.

3. The money deposited with the Commission by Nova in connection with this complaint, together with interest earned thereon, is to be disbursed to defendant AirTouch.

4. Case 98-02-036 is closed.

This order is effective today.

Dated September 3, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

APPENDIX K

Decision 98-11-016 November 5, 1998
BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

California Wireless Resellers Association, Complainant, vs. Los Angeles Cellular Telephone Company and AirTouch Cellular, Defendants.	Case 98-06-055 (Filed June 26, 1998)

OPINION

1. Summary

California Wireless Resellers Association (California Wireless), representing wireless telephone resellers in the Los Angeles area, complains that Los Angeles Cellular Telephone Company (Los Angeles Cellular) and AirTouch Cellular (AirTouch) refuse to supply certain digital cellular service products on terms and at rates that would qualify as wholesale. Los Angeles Cellular and AirTouch move to dismiss on grounds that the Commission lacks jurisdiction to adjudge the lawfulness of rates charged by cellular telephone carriers. The motion is granted. The complaint is dismissed.

2. Nature of Complaint

California Wireless alleges that Los Angeles Cellular offers digital cellular service to retail customers, but that the conditions of service and rates offered to wireless resellers on some of these digital products "were not and are not wholesale rates and were not and are not offered to the resellers on a wholesale basis." (Complaint, pp. 2-3) Similarly, complainant alleges AirTouch offers its digital service on terms and at rates

that do not constitute reasonable wholesale offerings to resellers.

California Wireless asks this Commission to require defendants to provide digital service to wireless resellers at reasonable wholesale rates, and to require defendants to refund to resellers the difference between the rates actually charged and reasonable wholesale rates.

Los Angeles Cellular and AirTouch deny that they have failed to offer their digital services to reseller customers. They admit that certain contract terms and price discounts are offered on some of their retail plans but not on others, but they deny that this is unlawful. They state that resellers may purchase service under these alternative plans, but that they must accept the terms, conditions and service limitations of the plans.

3. Procedural History

This case was filed on June 26, 1998. Notice of the filing appeared in the Commission's Daily Calendar on July 14, 1998. On July 21, 1998, defendants were instructed to answer the complaint within 30 days. The instructions, copies of which were served on complainant, assigned the matter to Commissioner Duque and Administrative Law Judge Walker and categorized the case as an adjudicatory proceeding. Because we have decided to grant the motions to dismiss, no scoping memo is necessary, nor is a hearing required. As noted in the instructions to answer, a hearing is not required where the matter "is otherwise resolved by the parties," i.e., through pleadings addressing the motion to dismiss. The categorization of this matter as adjudicatory has not been contested by the parties.

4. Motions to Dismiss

Los Angeles Cellular and AirTouch on August 26, 1998, filed motions to dismiss the complaint on grounds that this Commission lacks jurisdiction to require defendants to offer particular rates, wholesale or otherwise, for the services

purchased by resellers.[1] California Wireless responded to the motions on September 15, 1998, arguing that this Commission may regulate terms and conditions of wireless service, and that the obligation to provide wholesale service at wholesale rates is a term and condition of cellular service. For the reasons set forth below, we agree that the Commission is without jurisdiction to address the rate practices alleged in this complaint, and that such enforcement must be left instead to the Federal Communications Commission (FCC) and to the federal courts.

5. Ratemaking Preemption

In recognition of the rapid growth of the wireless telecommunications services industry, Congress in 1993 amended the Communications Act of 1934, 47 U.S.C. §§151 et seq., as amended, to provide a uniform federal regulatory framework for all commercial mobile radio services.[2] Pursuant to its stated goals of regulatory uniformity and deregulation of the industry, Congress amended Section 332 of the Act to provide:

> "[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a state regulating the other terms and conditions of commercial mobile services." (47 U.S.C.A. § 332(c)(3)(A).)

---

[1] AirTouch also moves to dismiss on the basis that complainants has failed to state a cause of action for which relief can be granted. Because we dismiss the complaint on jurisdictional grounds, we do not reach this other ground for dismissal.

[2] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L.No. 103-66, 107 Stat. 312, 387-97 (1993).

On August 8, 1994, as authorized by the Act, the Commission filed a petition with the FCC to continue the Commission's jurisdiction over the rates of cellular carriers for an 18-month period. On May 19, 1995, the FCC released its report and order denying the petition and, on June 8, 1995, the Commission announced that it would not appeal the FCC's denial.[3]

Consequently, this Commission lacks jurisdiction to hear complaints regarding the lawfulness of rates charged by cellular carriers. As the Commission has concluded with respect to cellular and other commercial mobile service carriers, "we will not entertain disputes regarding the level or reasonableness of any rate."[4]

California Wireless argues that the gravamen of its complaint is the obligation of facilities-based cellular providers to make their services available to resellers on a wholesale basis. It argues that the Commission is not precluded from regulating terms and conditions that may relate to rates, and that an order requiring wholesale terms for all defendants' services can be made without setting particular dollar amounts for rates. California Wireless does not explain, however, how wholesale rates can be required without establishing those rates.

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[3] On June 22, 1995, the Cellular Resellers Association sought reconsideration of the FCC's denial. The FCC denied the petition for reconsideration in an order issued on August 8, 1995.

[4] *Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications*, D.96-12-071, at 23 (December 20, 1996). A number of judicial authorities support this view. *See In re Comcast Cellular Telecom Litigation* (E.D.Pa. 1996) 949 F.Supp. 1193, 1203-1204 ("All state regulation of the rates charged by CMRS providers is explicitly preempted by the language of the Act."); *Lee, et al. v. Contel Cellular of the South* (S.D.Ala. 1996) 1996 U.S.Dist. LEXIS 19636 (Communications Act preempts plaintiff's breach of contract claim challenging rounding practices in calculating cellular charges.)

In the recent case of *Nova Cellular v. AirTouch Cellular*, D.98-09-037 (September 3, 1998), the Commission dismissed a similar complaint for lack of jurisdiction. There, complainant argued that while defendant's rate plans were available on a resale basis to complainant, wholesale rates charged for some of the plans did not reflect certain cost savings realized by the defendant. Complainant described the action as a billing dispute and sought a Commission order requiring defendant to charge wholesale rates that recognized the alleged cost savings. The Commission in its decision recognized that, however labeled, complainant's demand inevitably would involve the Commission in "ratemaking for cellular telephone services, an activity in which the Commission has been preempted." (*Id.*, slip op. at 5-6.)

Similarly here, California Wireless does not contend that its members are barred from subscribing to service under any of the plans offered by defendants. Instead, it contends that defendants rates are unreasonable when applied to resellers, and it asks the Commission to impose a "reasonable margin." The type of margin that complainant would have us adopt is undeniably cost-based. This would entangle the Commission in the kind of ratemaking activity that we found in *Nova Cellular* has been preempted.

While we agree that the Commission retains authority to handle consumer complaints in matters of cellular nonrate terms and conditions of service,[5] the Commission does not have jurisdiction to establish wholesale rates for service plans offered by defendants and to other refunds to California Wireless for

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[5] *See* D.96-12-071, Conclusion of Law 10: "The Commission shall continue to monitor the structure, conduct and performance of CMRS carriers, and to handle CMRS consumer complaints, ensuring that facilities-based carriers not restrict in any manner, by way of nonrate terms and conditions, the ability of resellers to purchase or resell cellular or other telecommunications services to the public."

amounts paid in excess of those rates. Since we lack jurisdiction to consider the subject matter in question, the complaint must be dismissed.

Findings of Fact

1. Complainant alleges that defendants unlawfully fail to make certain services available at wholesale rates and terms.

2. Defendants have moved to dismiss the complaint for lack of jurisdiction.

Conclusions of Law

1. Congress in 1993 amended the Communications Act of 1934 to preempt state and local regulation of the rates charged by cellular telephone carriers.

2. The gravamen of the complaint is that rates made available to resellers for certain cellular service products are not wholesale rates.

3. The Commission has been preempted from prescribing rates for cellular telephone service.

4. The motions to dismiss the complaint for lack of subject matter jurisdiction should be granted.

ORDER

IT IS ORDERED that:

1. The motions of Los Angeles Cellular Telephone Company and AirTouch Cellular to dismiss the complaint of the California Wireless Resellers Association for lack of subject matter jurisdiction is granted.
2. The complaint is dismissed.
3. Case 98-06-055 is closed.

This order is effective today.

Dated November 5, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

MOTION FILED
JAN 11 1999

No. 98-947

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

AT&T WIRELESS SERVICES and
MCCAW CELLULAR COMMUNICATIONS, INC.,
Petitioners,
v.
CORYELLE TENORE, CHARLES F. PETERSON and
KAREN M. COLE, on behalf of themselves
and all others similarly situated,
Respondents.

On Petition for Writ of Certiorari to the Washington Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

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On Petition for Writ of Certiorari to the Washington Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Cellular Telecommunications Industry Association ("CTIA") hereby moves, pursuant to Rule 37 of this Court, for leave to file the attached brief amicus curiae in support of Petitioners. Petitioners have given their consent. Respondents, despite numerous inquiries, have not stated whether they consent.

CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership covers all commercial mobile radio service ("CMRS") providers and manufacturers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more PCS carriers and more cellular carriers than any other trade association. As such, CTIA is uniquely situated to represent the interests of the wireless industry with respect to the pending petition for writ of certiorari.

As explained more fully in the accompanying brief, the resolution of this case is of great significance to amicus and its members. If left uncorrected, the decision of the Washington Supreme Court will impede the growth of the wireless industry and substantially harm wireless service providers. This is so because the decision effectively permits a state—whether by legislative action or by the judicial award of rate rebates—to regulate the rates charged by wireless carriers operating in that individual state. Congress specifically acted to preempt state regulation of wireless rates because it recognized that state rate regulation was inappropriate for an industry that operates without regard to state lines. CTIA believes that its brief will provide the Court with relevant information and argument not already brought to the Court's attention by the parties, particularly with respect to the broad significance of the question presented, and the proper construction of federal legislation preempting states from regulating wireless carriers' rates.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
REASONS FOR GRANTING THE PETITION	2
I. STATES ARE FORBIDDEN FROM ENGAGING IN RATE REGULATION OF WIRELESS TELECOMMUNICATIONS CARRIERS	4
A. Federal Law Prohibits States From Regulating Wireless Carriers	4
B. The Washington Supreme Court Decision Incorrectly Allows State Regulation of Wireless Carriers' Rates	8
II. CONSUMERS OF WIRELESS SERVICES HAVE A FEDERAL FORUM TO REDRESS THEIR GRIEVANCES	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

AT&T Co. v. Central Office Tel., Inc., 118 S. Ct. 1956 (1998) 8, 9
In Re Long Distance Telecommunications Litigation, 831 F.2d 627 (6th Cir. 1987) 12
Lee v. Contel Cellular of the South, 1996 Dist. LEXIS 19636 (Nov. 21, 1996) 13
Nat'l Communications Ass'n, Inc. v. AT&T, 46 F.3d 220 (2d Cir. 1995) 12
PACE Membership Warehouse, Inc. v. US Sprint Communications Co. Ltd. Partnership, 1991 U.S. Dist. LEXIS 19788 (D. Colo. February 8, 1991) 12
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 10
Time Warner Cable v. Doyle, 66 F.3d 867 (7th Cir. 1995) 9

STATUTES

47 U.S.C. § 152(b) (1994) 11
47 U.S.C. § 201 (1994) 12
47 U.S.C. § 201(b) 1994 12
47 U.S.C. § 202 (1994) 12
47 U.S.C. § 207 (1994) 12
47 U.S.C. § 208 (1994) 12
47 U.S.C. § 209 (1994) 12
47 U.S.C. § 332(c)(1) (1994) 11
47 U.S.C. § 332(c)(3)(A) (1994) 4, 6
47 U.S.C. § 543 (1994) 9
Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 6002(b), 107 Stat. 312 4

LEGISLATIVE MATERIALS

H.R. Rep. No. 103-111 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378 ..... 2, 4
H.R. Rep. No. 103-213 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378 4

TABLE OF AUTHORITIES—Continued

FCC DECISIONS	Page
Report and Order and Order On Reconsideration, *Petition of Arizona Corporation Commission to Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services And Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 10 F.C.C.R. 7824 (1995)	6
Report and Order, *Petition of New York State Public Service Commission To Extend Rate Regulation*, 10 F.C.C.R. 8187 (1995)	6
Report and Order, *Petition of the Connecticut Department Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, 10 F.C.C.R. 7025, *aff'd sub nom.*, 78 F.3d 842 (2d Cir. 1996)	5, 6
Order on Reconsideration, *Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates*, 11 F.C.C.R. 796 (1995)	6
Report and Order, *Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486 (1995)	5, 6, 7, 11, 13
Report and Order, *Petition of the State of Ohio for Authority To Continue To Regulate Commercial Mobile Radio Services*, 10 F.C.C.R. 7842 (1995)	6
Report and Order, *Petition on Behalf of the Louisiana Public Service Commission for Authority To Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana*, 10 F.C.C.R. 7898 (1995)	6

TABLE OF AUTHORITIES—Continued

Page

Report and Order, *Petition on Behalf of the State of Hawaii, Public Utility Commission, for Authority To Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii*, 10 F.C.C.R. 7872 (1995) 6

Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 F.C.C.R. 1411 (1994) 5, 6, 11

ADDITIONAL FCC MATERIALS

First Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 10 F.C.C.R. 8844 (1995) 9

Notice of Proposed Rulemaking, *In the Matter of Truth-in-Billing and Billing Format*, 13 F.C.C.R. 18176 (1998) 13

Third Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 13 F.C.C.R. 19746 (1998) 5, 6

MISCELLANEOUS

Black's Law Dictionary (6th ed. 1990) 8

Comments of the Federal Trade Commission, *In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170 (Nov. 13, 1998) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

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On Petition for Writ of Certiorari to the Washington Supreme Court

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BRIEF AMICUS CURIAE OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Cellular Telecommunications Industry Association ("CTIA") is the international organization of the wireless communications industry for both wireless carriers and manufacturers.[1] Membership covers all commercial mobile radio service ("CMRS") providers and manufacturers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers.

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[1] No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than amicus curiae and its members made any monetary contribution to the preparation or submission of this brief.

CTIA represents more PCS carriers and more cellular carriers than any other trade association. As such, CTIA is uniquely situated to represent the interests of the wireless industry with respect to the pending petition for writ of certiorari.

If left uncorrected, the decision of the Washington Supreme Court will impede the growth of the wireless industry and substantially harm wireless service providers. This is so because the decision effectively permits a state—whether by legislative action or by the judicial award of rate rebates—to regulate the rates charged by wireless carriers operating in that individual state. Congress specifically acted to preempt state regulation of wireless rates because it recognized that state rate regulation was inappropriate for an industry that operates without regard to state lines.

The decision of the Washington Supreme Court is wrong as a matter of federal telecommunications law. If left uncorrected, the decision will substantially harm the wireless industry by creating the balkanization that Congress sought to prevent. This Court should grant the petition for writ of certiorari and reverse the decision of the Washington Supreme Court.

REASONS FOR GRANTING THE PETITION

Wireless telecommunications carriers are an "integral part of the national telecommunications infrastructure" that, "by their nature, operate without regard to state lines." H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587. Given the inherently interstate nature of wireless services and their importance to the economy, Congress recognized that state-by-state rate regulation would inhibit the industry's growth, and ultimately harm consumers.

While Congress preempted state regulation of wireless rates, it permitted states to regulate "the other terms and conditions" of wireless services. Plaintiffs in this case

sought to circumvent federal preemption of their causes of action by crafting their state civil action as a dispute regarding the disclosure of a wireless rate, rather than a dispute concerning the rate itself. Plaintiffs' clever wording of their causes of action does not obviate the fact that, at the end of the day, the gravamen of the dispute is whether these plaintiffs were overcharged and, if so, the amount of rate rebate that they are entitled to receive.

Avoiding this sort of state-by-state regulation of the wireless industry is critical to the industry's continued success and the continued application of federal law in the manner Congress intended. The successful history of the wireless industry is a testament to the principle that vigorous free market competition, rather than burdensome and conflicting state regulation, is the best way to ensure continued industry growth, improvements in technology, decreasing prices, and improved customer service. Vigorous free market competition does not mean that customers who are treated unfairly or illegally are left with no remedy, however. On the contrary, the same federal statutory scheme that prohibits state rate regulation authorizes the Federal Communications Commission ("FCC" or "Commission") and the federal government to resolve industry-customer rate and billing disputes.

This Court should grant the petition and reverse the decision of the Washington Supreme Court in order to preserve the important Congressional directive of federal preemption of state rate regulation of wireless services; avoid the balkanization of this critical and fast growing industry; and ensure an appropriate remedy for mistreated customers.

I. STATES ARE FORBIDDEN FROM ENGAGING IN RATE REGULATION OF WIRELESS TELECOMMUNICATIONS CARRIERS

A. Federal Law Prohibits States From Regulating Wireless Carriers

In 1993, Congress amended the Communications Act of 1934 ("Communications Act") to ensure that the federal government, rather than the states, would maintain sole authority to oversee the rates charged by the fast-growing wireless telecommunications industry. *See Omnibus Budget Reconciliation Act of 1993,* Pub. L. No. 103-66, 6002(b), 107 Stat. 312, 392-93 (codified in scattered sections of 47 U.S.C.). Congress accomplished this objective by preempting state regulation of the rates charged by wireless carriers:

> Notwithstanding section[] 2(b) [which otherwise gives states jurisdiction over intrastate rates] . . . ., no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile service.

47 U.S.C. § 332(c)(3)(A) (1994).

The legislative history of section 332 clarifies Congress' understanding that a competitive wireless marketplace, guided by a uniform national policy and free from unnecessary state regulatory involvement, will ensure that customers enjoy reasonable rates and high quality services, while encouraging and maximizing investment in this capital intensive industry. *See* H.R. Rep. No. 103-213 at 480-81 (1993) *reprinted in* 1993 U.S.C.C.A.N. 378, 1169-70. ("Conference Report") (finding that "uniform national policy is necessary and in the public interest" to "promote competition for wireless services" and to avoid "State regulation [that might] be a barrier to the development of competition in this market"); H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587 (federal legislation deigned to encourage fur-

ther investment in wireless infratructure); Report and Order, *Petition of the Connecticut Department Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut,* 10 F.C.C.R. 7025, 7031-32 (1995) (investment in wireless infrastructure will be maximized by "establishing a stable, predictable regulatory environment that facilitates prudent business planning"), *aff'd sub nom.*, 78 F.3d 842 (2d Cir. 1996); Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services,* 9 F.C.C.R. 1411, 1421 (1994) ("*CMRS Second Report and Order*") (regulation of CMRS must be "perceived by the investment community as a positive factor that creates incentives for investment in the development of valuable communication services—rather than as a burden standing in the way of entrepreneurial opportunities"). Preemption of state rate regulation was deemed critical to the growth and development of the wireless industry because Congress sought to avoid conflicting, state-by-state ratemaking. *See* Report And Order, *Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates,* 10 F.C.C.R. 7486, 7499 (1995) ("*California Regulatory Authority Over Intrastate Cellular Service Rates*").

The recent history of the wireless industry confirms that competition has succeeded in meeting Congress' objectives. As recognized by the FCC, "competition in a number of segments of the CMRS industry has grown more than it has ever before. While this positive development is still in its early stages, the signs of competition are clear." Third Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconcilitation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services,* 13 F.C.C.R. 19746, 19749 (1998). Indeed, the wireless

industry has added more than 18 million new subscribers in each of the past three years, with total subscribership reaching 55 million by the end of 1997. *Id.* at 19751. Just as was envisioned by Congress in its 1993 revisions to the Communications Act, the wireless industry has succeeded by relying on robust, unfettered competition, rather than burdensome state rate regulation.

Notwithstanding the general rule that states must refrain from regulating wireless carriers' rates, states may, under certain limited and specified circumstances, petition the FCC to regulate wireless carriers' rates. 47 U.S.C. § 332(c)(3)(A) (1994).[2] States face a high burden of proof to obtain FCC authority to engage in regulation of wireless carriers' rates, however. *See CMRS Second Report and Order* at 1506 (finding that "such petitions must demonstrate both that market conditions . . . do not protect subscribers adequately from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, and a substantial portion of the CMRS subscribers . . . have no alternative means of obtaining basic telephone service").

The FCC has rejected all petitions by states that have sought authority to regulate wireless carriers' rates since the enactment of the 1993 amendments,[3] holding that the

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[2] Section 332 provides that a State

> may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—(i) market conditions with respect to such services fail to protect subscribers from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

47 U.S.C. § 332(c)(3)(A) (1994).

[3] Report and Order, *Petition on Behalf of the Louisiana Public Service Commission for Authority To Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State*

proponents of state rate regulation had not met the heavy burden imposed on those who would create exceptions to the national policy embodied in section 332(c). In its decision denying a petition filed by the State of California, for example, the Commission explained that section 332's burden of proof is critical because Congress sought "to establish a *national* regulatory policy for CMRS, not a policy that is balkanized state-by-state." Report and Order, *California Regulatory Authority Over Intrastate Cellular Service Rates* at 7499. *Id.* at 7513. The statute's high burden of proof, as well as the FCC's denial of all prior state petitions to engage in rate regulation, further demonstrate Congress' and the FCC's recognition of the importance of a national, rather than state-by-state, system of rate regulation for the wireless industry.

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of Louisiana, 10 F.C.C.R. 7898 (1995); Report and Order and Order On Reconsideration, *Petition of Arizona Corporation Commsion, To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services And Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 10 F.C.C.R. 7824 (1995); Report and Order, *Petition of New York State Public Service Commission To Extend Rate Regulation*, 10 F.C.C.R. 8187 (1995); Report and Order, *California Regulatory Authority Over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486 (1995), Order on Reconsideration, 11 F.C.C.R. 796 (1995) (denying California's reconsideration petition to regulate CMRS rates); Report and Order, *Petition of the Connecticut Department Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, 10 F.C.C.R. 7025 (1995), *aff'd sub nom.*, 78 F.3d 842 (2d Cir. 1996); Report and Order, *Petition on Behalf of the State of Hawaii, Public Utility Commission, for Authority To Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii*, 10 F.C.C.R. 7872 (1995); Report and Order, *Petition of the State of Ohio for Authority To Continue To Regulate Commercial Mobile Radio Services*, 10 F.C.C.R. 7842 (1995).

B. The Washington Supreme Court Decision Incorrectly Allows State Regulation of Wireless Carriers' Rates

Pursuant to Section 332, states are prohibited from regulating wireless carriers' "rates," but are permitted to regulate "the other terms and conditions" of wireless services. Accordingly, in any case where preemption is at issue, the central inquiry is whether the state action at issue concerns "rates" or "other terms and conditions" of wireless services.

This Court has held that the term "rates," as used in section 332, must be defined broadly to ensure that states do not engage in backdoor ratemaking under the guise of regulating "other terms and conditions." *AT&T Co. v. Central Office Tel., Inc.*, 118 S. Ct. 1956, 1963 (1998) (*"Central Office Tel."*). "Rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa." *Id.; see also Black's Law Dictionary* 1261 (6th ed. 1990) (defining "rate" as "a charge, valuation, payment or price fixed according to ration, scale or standard").

Plaintiffs argued successfully before the Washington Supreme Court that their allegation of rate overcharging was not preempted because it focused on the wireless provider's disclosure of its practice of "rounding-up," rather than upon the question whether a fully disclosed practice of rounding-up was lawful. This is a distinction without a difference. Most wireless rate disputes can be rephrased as disputes concerning "other terms and conditions." By focusing on Plaintiffs' characterization of their claims, rather than upon the gravamen of the claims themselves, the Washington Supreme Court failed to take into account the broad definition of the term "rates" and thereby un-

duly limited Congress' intent to preempt state-by-state rate regulation.

As this Court recognized in *Central Office Tel.*, billing rates do not exist in isolation. In order to have a meaning, a billing rate must, at a minimum, attach to a particular service and to a particular time increment. *See also* First Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services,* 10 F.C.C.R. 8844, 8868 (1995) (the billing increment is an integral component of a wireless rate). A rate of ten cents, for example, has no meaning unless one knows that the rate refers to the use of local wireless services (the particular service) for one minute (the time increment). There are innumerable related issues concerning the definition of the particular service or time increment. Does the service include long distance? Are there additional charges such as land-line connection fees or roaming fees? Is air time billed in minutes, seconds, tenths of seconds, or hundredths of seconds? Does the billing clock begin to run when the receiving phone rings, when the call is answered, or at some other time? When does the clock stop running? By defining the term "rates" narrowly to include only the quoted dollar figure in isolation, the decision of the Washington Supreme Court effectively disregards *Central Office Tel.* and permits the narrow exception in section 332 permitting states to regulate "other terms and conditions" to overwhelm the general rule preempting all state regulation of wireless rates.[4]

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[4] A somewhat similar issue of statutory construction was presented with respect to section 3 of the Cable Television Consumer Protection and Competition Act of 1992. 47 U.S.C. § 543 (1994). The United States Court of Appeals for the Seventh Circuit, interpreting legislation prohibiting "states from regulating cable rates," held that a state civil consumer protection action was preempted

In addition, while Plaintiffs contend that their causes of action are about inadequate disclosure, not rates, their Complaint seeks a rate rebate of all charges collected by Petitioners as a result of the alleged inadequate disclosure. App. 39a attached to Petitioner's Petition for Writ of Certiorari. Plaintiffs should not be permitted to escape the plain allegations in their own Complaint.

The fact that the Washington Supreme Court's decision concerns a request for a judicial award of a rate rebate as a remedy for alleged overcharging, rather than an act by the state legislature to regulate wireless rates or approve a rate rebate, also is a distinction without a difference. A state court order awarding a remedy of a rate rebate is the same for purposes of federal preemption analysis as is a state legislative act of rate regulation. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."). The end results of the legislative and judicial cases are indistinguishable: In either instance, states—contrary to the letter and spirit of section 332—act as final arbiters of the rates paid by wireless carriers' customers.

The Washington Supreme Court also erred by declining to grant preemption based on the fact that wireless carriers are not required to file tariffs. *See* App. 31a attached to Petitioner's Petition for Writ of Certiorari. The fact that wireless carriers do not file tariffs is irrelevant to the issue whether states may engage in legislative or judicial rate-making. Section 332 prohibits the states from regulating

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principally because "rate structure is a federal matter and state consumer laws that impact upon it conflict with the operation of the rate structure." *Time Warner Cable v. Doyle*, 66 F.3d 867, 873, 882 (7th Cir. 1995).

"rates" irrespective of whether the wireless carrier has or is required to file a tariff. As was envisioned by Congress, *see* 47 U.S.C. § 332(c)(1) (1994), the FCC has refrained from requiring wireless carriers to file tariffs to promote the growth of a competitive wireless industry. In the *CMRS Second Report and Order,* the Commission specifically found that "[r]emoving or reducing regulatory requirements . . . tends to encourage market entry and lower costs [which results in] reasonable rates. Therefore, enforcement of [tariff filing requirements] is not necessary." *Second Report and Order* at 1478. It would be ironic and contrary to these goals if the absence of a tariff actually slowed growth and competition of the wireless industry by subjecting wireless carriers to inconsistent and burdensome state-by-state rate regulation.

II. CONSUMERS OF WIRELESS SERVICES HAVE A FEDERAL FORUM TO REDRESS THEIR GRIEVANCES

The fact that states do not have jurisdiction to resolve rate disputes between consumers and the wireless industry does not mean that consumers have no forum to redress their grievances. On the contrary, when Congress revised section 332 to preempt state rate regulation, it also amended section 2(b) of the Communications Act to give the FCC authority to address disputes concerning wireless rates. Thus, while section 2(b) generally deprives the Commission of authority over intrastate communications, Congress revised that section to except wireless carriers from this general limitation. 47 U.S.C. § 152(b) (1994) (establishing that the Commission lacks jurisdiction over intrastate communications "[*e*]*xcept as provided in . . . section 332*") (emphasis supplied). The end result is to give the FCC jurisdiction over rates for all wireless services.[5] Aggrieved wireless consumers may seek redress by,

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[5] *But see* Report and Order, *California Regulatory Authority Over Intrastate Cellular Service Rates* at 7563 ("[W]e do not con-

among other things, filing a complaint with the FCC. 47 U.S.C. § 208 (1994). The Commission will review the complaint pursuant to the standards specified in sections 201 and 202 of the Act,[6] and may award damages to the injured consumer as appropriate. 47 U.S.C. § 209 (1994).[7] Moreover, Congress' decision to rely on the

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sider it necessary at this time to address the contention that we have jurisdiction over intrastate rates for CMRS . . . The question . . . has been raised in petitions for reconsideration of the *CMRS Second Report and Order* and will be addressed some time in the future in the context of that proceeding."). The Commission has not yet addressed the petitions for reconsideration of the *CMRS Second Report and Order* that raised this issue. Nonetheless, the Commission has not ruled that it lacks jurisdiction over intrastate rates. Arguments to that effect are flatly contradicted by the express language of sections 2(b) and 332(c)(3).

[6] 47 U.S.C. §§ 201-202 (1994). Pursuant to section 201(b) of the Communications Act, the FCC has jurisdiction over carriers' "charges, practices, classifications, and regulations."

[7] Consumers also may seek redress in federal court for alleged rate violations by CMRS providers. *See* 47 U.S.C. § 207 (1994). Federal courts frequently refer cases brought under section 207 to the FCC pursuant to the Commission's primary jurisdiction over such matters. Under the doctrine of primary jurisdiction, a federal court will stay the judicial process pending referral to an administrative agency of issues that are within the agency's special expertise. *In Re Long Distance Telecommunications Litigation*, 831 F.2d 627, 632 (6th Cir. 1987). In determining whether to refer a case to an agency, a court will consider (1) whether the question at issue is within the standard experience of judges or involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made. *Nat'l Communications Ass'n, Inc. v. AT&T*, 46 F.3d 220, 222 (2d Cir. 1995); *PACE Membership Warehouse, Inc. v. US Sprint Communications Co. Ltd. Partnership*, 1991 U.S. Dist. LEXIS 19788, at *4 (D. Colo. February 8, 1991). Accordingly, irrespective of whether the case is filed initially at the FCC or in federal district court, it likely will be decided by the FCC in the first instance.

Commission to impose this check comports with the uniform, national regulatory structure for CMRS reflected in section 332(c).

Federal regulatory jurisdiction presents the significant advantage of avoiding conflicting and inconsistent state decisions. As one federal court has noted, "[i]f state courts or even federal courts throughout the country were allowed to make individual case-by-case determinations on the appropriateness of 'rounding' air time usage rates there would be a substantial danger of inconsistent rulings and interference with the FCC's policy making as to competition." *Lee v. Contel Cellular of the South*, 1996 Dist. LEXIS 19636, *20 (Nov. 21, 1996). Because wireless carriers operate across state lines, the benefits of a national regulatory policy are particularly significant. *See* Report and Order, *State of California Regulatory Authority Over Intrastate Cellular Service Rates* at 7499 (Congress sought to "establish a *national* regulatory policy for [wireless communications], not a policy that is balkanized state-by-state").

Further confirmation of the FCC's authority to resolve disputes concerning wireless rates and billing is found in the Commission's recently-initiated "Truth-in-Billing" proceeding, which seeks comment on proposals enabling the agency to regulate telecommunications carriers' (including wireless carriers') billing practices. Notice of Proposed Rulemaking, *In the Matter of Truth-in-Billing and Billing Format*, 13 F.C.C.R. 18176, 18179 (1998). The FCC specifically asserted its belief that it has jurisdiction over telecommunications carriers' billing practices. *Id.* at 18182, 18183. In response to the FCC's NPRM, the Federal Trade Commission, among others, acknowledged that the FCC is the appropriate regulatory body to resolve consumer billing issues, and supported the FCC's assertion of jurisdiction in this area. Comments of the Federal Trade Commission, *In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170, p.1 (Nov. 13,

1998) (noting that, in some instances, the FCC and FTC had overlapping jurisdiction).

By upholding the Congressional directive preempting state rate regulation, the Court will ensure that wireless rates and billing practices remain matters of federal law and policy, consistent with Congressional directives.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 98-947

In The
Supreme Court of The United States
October Term 1998

AT&T WIRELESS SERVICES and McCAW CELLULAR COMMUNICATIONS, INC.,
Petitioners,

v.

CORYELL TENORE, CHARLES F. PETERSON and KAREN M. COLE, on behalf of themselves and all others similarly situated,
Respondents.

Petition For A Writ Of Certiorari
To The Washington Supreme Court

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 47 U.S.C. § 332(c)(3)(A), which prohibits regulation by the States of "the entry of or the rates charged" by cellular telephone service providers, preempts state law claims for injunctive relief and damages based on deceptive business practices, when Congress specifically provided that § 332 "shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."

2. Whether, in light of the language of 47 U.S.C. § 414 which preserves all "remedies now existing at common law," 47 U.S.C. § 332(a)(3)(A) gives AT&T immunity to deceive consumers and abrogate its contractual promises in violation of state laws.

RULE 29.6 STATEMENT

Pursuant to Sup. Ct. Rule 29.6, respondents hereby state that they are individuals and thus have no corporate parents or subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. AT&T's Failure to Disclose 1

B. Proceedings Below 3

REASON FOR DENYING THE PETITION 6

I. THERE IS NO CONFLICT AMONG THE HIGHEST COURTS OF THE STATES OR BETWEEN A HIGH STATE COURT AND A COURT OF APPEALS THAT WARRANTS REVIEW 8

A. There is No Conflict Among the State High Courts that Deception Claims Are Not Preempted 9

B. AT&T's Review of Intermediate Court Decisions Do Not Present a Conflict of Sufficient Magnitude to Warrant Review 11

C. If a Conflict Exists it is at Such a Nascent Stage that Review is Premature . 15

II. THE WASHINGTON SUPREME COURT OPINION IS HARMONIOUS WITH PRIOR OPINIONS OF THIS COURT, AND OTHERS, THAT AN AWARD OF DAMAGES DOES NOT EQUAL IMPERMISSIBLE RATE REGULATION 17

A. The Washington Supreme Court Decision Is Harmonious With Supreme Court Precedent 17

B. The Washington Supreme Court Holding Is In Accord With Numerous Other Holdings that Damages Are Not *Per Se* Regulation 23

C. The Washington Supreme Court Opinion Follows The Proper Standards Governing Preemption 24

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

AT&T Co. v. Central Office Tel. Inc.,
118 S. Ct. 1956 (1998) 14, 19
American Airlines v. Wolens,
513 U.S. 219 (1995) 26
American Inmate Phone Sys., Inc. v. U.S.
Sprint Comms. Co., 787 F. Supp. 852
(N.D. Ill. 1992) 22
Arkansas Louisiana Gas Co. v. Hall,
453 U.S. 571 (1981) 14
Ball v. GTE Mobilnet of California, Ltd.,
No. 98AS03811 (Cal. Super. Ct.
(Sacramento Cty.) Nov. 17, 1998) 12
Bennett v. Alltel Mobile Comm. Of Alabama, Inc.,
Civil Action No. 96-D-232-N, slip op.
(M.D. Ala. May 14, 1996) 10, 21, 22
Carroll v. Cellco Partnership,
Docket Nos. AM-001316-96T3 and
AM-001303-96T3 (N.J. Super. Ct., App.
Div., June 25, 1997) 13
Cipollone v. Liggett Group,
505 U.S. 504 (1992) 25
In re Comcast Cellular Telecomms.,

949 F. Supp. 1193 (E.D. Pa. 1996) 12
DeCastro v. AWACS, Inc.,
935 F. Supp. 541 (D.N.J. 1996) 10, 21
Freightliner Corp. v. Myrick,
514 U.S. 280 (1995) 25
Hardy v. Claircom Communications Group, Inc.
(d/b/a AT&T Wireless Services),
937 P.2d 1128 (Wash. Ct. App. 1997) 4
Jefferson v. City of Tarrant,
522 U.S. 75 (1997) 17
Kellerman v. MCI Telecomms. Corp.,
493 N.E.2d 1045 (Ill.), *cert. denied.*,
479 U.S. 949 (1986) 9, 10, 11, 21
In re Long Distance Telecomms. Litig.,
831 F.2d 627 (6th Cir. 1987) 10
Marcus v. AT&T Corp.,
938 F. Supp. 1158 (S.D.N.Y. 1996),
aff'd, 138 F.3d 46 (2nd Cir. 1998) 8
Matter of Richman Bros. Records Inc. v. U.S. Sprint
Comms. Co., Release No. DA 95-2438,
10 F.C.C. Rcd 13639, 1995 FCC LEXIS 7985 ... 5
Moulton v. Alltel Mobile Comm. of Alabama, Inc.,
CA No. 96-D-89-N, slip op.
(M.D. Ala. Aug. 16, 1996) 10, 21
Nader v. Allegheny Airlines,
426 U.S. 290 (1976) 5, 20, 21

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) 25

Nova Cellular West, Inc. v. Air Touch Cellular of San Diego, Case No. 98-02-036 (CPUC Sept. 3, 1998) . 14, 15

Powers v. AirTouch Cellular, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997) 14, 22

Rice v Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 16

Rogers v. Westel-Indianapolis Co., No. 49D03-9602-CP-0295 (Marion Super. Ct. (Ind.) July 1, 1996) 13

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) 23

Sanderson, Thompson, Ratledge & Zimny v. AWACS, Inc., 958 F. Supp. 947 (D. Del. 1997) . 9

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 23, 24

Simons v. GTE Mobilnet, Inc., No. H-95-5169 (S.D. Tex. Apr. 11, 1996) 11, 12, 22

Tenore v. AT&T Wireless Servs., 962 P.2d 104 (Wash. 1998) 5

Wegoland, Ltd. v. NYNEX Corp., 27 F.3d 17 (2nd Cir. 1994) 4

Westside Cellular, Inc. v. GTE Mobilnet, Inc.,
1995 Ohio PUC LEXIS 240 (Mar. 23, 1995) . . . 15

STATUTES

47 U.S.C. § 203(a) 19
47 U.S.C. § 332 (c)(3)(A) (the Federal
Communications Act) 3,5
47 U.S.C. § 414 . . . . . ix, 3, 26
Airline Deregulation Act, 49 U.S.C. § 41713 26
H.R. REP. NO. 103-111, 103RD CONGRESS 1ST SESS. 211
reprinted in 1993 U.S.C.A.A.N 378 5

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions identified by petitioner, another statutory provision involved is 47 U.S.C. § 414. This provision states, in pertinent part:

> Nothing in this chapter . . . shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

STATEMENT OF THE CASE

A. AT&T's Failure to Disclose

AT&T is the nation's leading seller of cellular telephone services. Respondents alleged that AT&T engaged in a deceptive, fraudulent and/or misleading practice that generates millions of dollars of "airtime" charges for airtime that consumers never receive. Pet. App. 2a-5a.

AT&T offers consumers a range of billing plans for its cellular phone services. These plans offer various fixed charges per month for a specified period of time, e.g. 30, 60 and 90 minutes. Pet. App. 4a. AT&T's advertisements likewise often represent that subscribers will receive certain guaranteed blocks of airtime for their monthly fee. For any airtime beyond the fixed-charge time allotted under each plan, the subscriber is charged at various rates "per minute," depending on the plan and whether the call is made during peak or off-peak hours. Airtime charges for time beyond that allocated in a customer's plan are substantially higher than airtime charges within a plan.

AT&T's contracts and advertisements also purport to describe how AT&T calculates such airtime. According to many of AT&T's customer service agreements, that it requires every subscriber to sign, AT&T charges from the first second of any call to the end of the call. This is

prominently described in the literature as "SEND TO END" billing. Pet. App. 3a.

In reality this is not how AT&T bills. Rather, while billing increments start when the send call button is pressed, billing ends not when the end button is pushed, but at the next full minute after the end button. So for example, a call lasting one minute and six seconds as measured from Send to End is billed as a full two minutes. Pet. App. 3a. This practice is called "rounding."[1]

AT&T's advertising disclosures and service agreements do not inform customers that AT&T secretly bills them for additional time *after* "the time [they] press end."[2] Similarly, no mention of rounding is made in the Customer Service agreement. As a result, customers who purchase plans allowing specified minutes of airtime per month certainly do not expect, and are not told, that AT&T will short them of their allotted time by virtue of the practice of rounding. When a customer exceeds the fixed time on the

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[1] AT&T claims that rounding is a long-standing industry practice. It may be that certain carriers rounded, but generally such rounding did not count toward the fixed time a consumer received under a rate plan, beyond which higher charges would be imposed.

[2] Although AT&T claims this is a standard practice, it cites no support in the record for this proposition. Indeed, one prominent television campaign, run by Nextel, features the fact that Nextel does not round up, but charges for the actual time used.

plan, he or she is then billed at an even higher rate for airtime. Thus, AT&T's practice deprives customers of the airtime they have purchased under a given plan. In the end, AT&T charges consumers tens of millions of dollars that neither its advertising nor its contracts disclose. Pet. App. 4a.

B. Proceedings Below

In light of the above, respondents filed a class action complaint seeking injunctive and monetary relief arising from AT&T's deceptive and unlawful conduct. Consistent with 332(c)(3)(A) 1994, the complaint attacked solely the "terms and conditions of" the services, and invoked, consistent with 47 U.S.C. § 414, the traditional state common law remedies based on deceptive conduct and breach of promise. At no time did respondents seek to change, diminish, or modify the rates being charged by AT&T. Respondents did not seek any relief that would disturb the uniformity of rates charged by AT&T. Rather, respondents sought to enforce the terms of AT&T's promises, that they would charge consumers from "Send to End" and would deliver the amount of airtime promised in the consumers' service plan.

AT&T moved to dismiss the complaint on the grounds that a lawsuit alleging that AT&T engaged in deceptive acts and practices in violation of state law, was preempted by (i) 47 U.S.C. § 332 (c)(3)(A) (the Federal Communications Act) and (ii) the doctrine of primary jurisdiction. During the

pendency of the briefing of AT&T's dismissal motion, the Washington Court of Appeals (Division I) issued its ruling in a somewhat related case, *Hardy v. Claircom Communications Group, Inc. (d/b/a AT&T Wireless Services)*, 937 P.2d 1128 (Wash. Ct. App. 1997). According to AT&T, *Hardy* is a Court of Appeal panel's determination that the FCA preempts all state law claims challenging AT&T's deceptive and unlawful conduct. Erroneously believing it was bound by *Hardy*, the superior court dismissed plaintiffs' claims.

Respondents immediately appealed to the Washington Supreme Court. Not surprisingly, the Washington Supreme Court reversed the superior court finding, and held that respondents' traditional state law claims of misrepresentation, fraud and consumer protection violation were not preempted by Section 332. Pet. App. 31a-32a. The Washington Supreme Court's reasoning was sound. To begin, the Washington Supreme Court found that the *Hardy* ruling, on which the superior court relied, was unpersuasive. *Hardy* involved the filed rate doctrine. This doctrine "is a court created rule to bar suits against regulated utilities involving allegations *concerning the reasonableness of the filed rates*." Pet. App. 8a-9a (emphasis supplied).[3] As the court correctly noted, and as AT&T conceded, AT&T "is specifically

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[3] In support of this statement the court cited *Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2nd Cir. 1994). During the proceedings below AT&T conceded that no filed rates were at issue. Pet. App. 13a.

exempted from tariff filing requirements . . . [as a result] those cases are not materially significant." *Tenore v. AT&T Wireless Servs.*, 962 P.2d 104 (Wash. 1998); Pet. App. 31a. Furthermore, the Washington court found that the express language of Section 332 makes clear that not all claims are preempted. This is because the last clause of Section 332 states that "this paragraph shall not prohibit a State from regulating the *other terms and conditions of commercial mobile services*." 47 U.S.C. § 332 (c)(3)(A) (emphasis supplied). The court found that this "terms and conditions" clause limits the preemptive reach of Section 332.[4] Additionally, the court found that the savings clause is indicative of Congressional intent "to preserve state law claims for billing or advertising which do not attack market entry or rates charged" by providers such as AT&T. Pet, App, 31a. Finally, the Supreme Court decision in *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), makes clear that a court may award damages without regulating rates. This is especially true where, as here, there is no requirement that a

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[4] *See* H.R. Rep. No. 103-111, 103rd Congress 1st Sess. 211 *reprinted in* 1993 U.S.C.A.A.N. 378, 588 (The phrase "terms and conditions" includes "customer billing information and practices and billing disputes and other consumer protection matters."). Through the "terms and conditions" language, the FCC has specifically noted that the FCA "preserves the rights of parties to pursue legal remedies against interstate carriers that they may pursue against other corporations such as liability for . . . misleading advertising. . . ." *In Matter of Richman Bros. Records Inc. v. U.S. Sprint Comms. Co.*, Release No. DA 95-2438, 10 FCC Rcd 13639, 13641-42, 1995 FCC Lexis 7985, at *16-17 (Dec. 13, 1995)(decided against consumer on other grounds).

tariff be filed, and any impact on rates is "merely incidental." *Id.*[5]

Hence, the court ruled against preemption because plaintiffs, through this lawsuit, are not attempting to alter the rates AT&T chooses to charge. All respondents seek is for AT&T to be held to the terms of its promise to bill "Send to End," as opposed to deceptively informing customers that they would be billed "Send to End" and then billing them "Send" to the next highest minute after which "End" is pressed. As AT&T concedes, it was not until after this lawsuit was filed that AT&T began selectively informing customers that it has been lying about the manner in which it charges for airtime. Pet. 8, n.7. In light of this concession, it is clear that AT&T is asking this Court to do something the Washington Supreme Court refused — turn a blind eye to its *admittedly* deceptive practice under the guise of federal preemption.

REASON FOR DENYING THE PETITION

Review of the Washington Supreme Court decision is neither "urgent" or warranted as AT&T suggests. Congress

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[5] Additionally, the court found that a "challenge to a practice that is not governed by a tariff filing does not implicate the 'conflict' inherent in contesting a practice or rate expressly regulated by an agency. . . ." Pet. App. 31a.

made a clear statement in Section 332 that it was not prohibiting states from regulating terms and conditions of cellular services and further provided that § 332 would not "abridge existing remedies." Requiring truthful advertising is not rate regulation. Requiring AT&T to bill customers as promised and awarding damages when AT&T has not done so is not "rate regulation." Indeed, the Washington Supreme Court decision simply requires AT&T to charge the rate it promised. Rather than giving "carte blanche" to regulate rates, the decision simply requires AT&T to conduct its business truthfully, a requirement imposed on all of corporate America. There is nothing novel or urgent arising from the imposition of honesty.

To further bolster its claim for review, AT&T warns that plaintiffs are asking courts to "regulate rates" for the entire wireless industry. Pet. at 9. As noted, however, this and similar lawsuits simply seek to enforce laws that require all businesses to tell the truth about billing and/or keep contractual promises. One carrier, U.S. West, has settled such claims and paid a rebate to its customers. Res. App. C-19. Such a settlement did not implicate U.S. West's rates or unravel the cellular industry as AT&T suggests will be the result. Thus, contrary to the central theme of AT&T's petition, the cellular industry and its ability to set rates is not being jeopardized by this type of litigation.

Finally, as explained below, there is no conflict among courts of appeals or high state courts that is ripe for review by this Court.

I.

THERE IS NO CONFLICT AMONG THE HIGHEST COURTS OF THE STATES OR BETWEEN A HIGH STATE COURT AND A COURT OF APPEALS THAT WARRANTS REVIEW

AT&T's claim of a conflict among the courts is a manufactured one pursued in a vain attempt to obtain review. There is no split in authority among the circuit courts of appeal or among the highest courts of the states. There is no confusion and controversy among courts — the decisions are uniform.

First, it is important to recognize the distinction between this case and the cases upon which AT&T relies. Cases which arise under the "filed tariff" doctrine, where a company is required to file a tariff by the FCC, uniformly find that state law damage claims are preempted. *See e.g., Marcus v. AT&T Corp.*, 938 F. Supp. 1158 (S.D.N.Y. 1996), *aff'd*, 138 F.3d 46 (2nd Cir. 1998). Cases which address traditional

state law claims such as deceptive advertising or failure to disclose, uniformly rule against preemption. *Kellerman v. MCI Telecomms. Corp.*, 493 N.E.2d 1045 (Ill.), *cert. denied,* 479 U.S. 949 (1986). This case did *not* involve the "filed tariff" doctrine *nor* the services offered by AT&T, but rather arises from issues of deceptive advertising and a failure to disclose and a breach of contract. Hence, the conflict and confusion claimed by AT&T simply does not exist.

The Washington Supreme Court found that the majority of cases relied on by AT&T were predicated upon the "filed rate" doctrine. However, as the court found, this doctrine is wholly inapplicable here — AT&T conceded that it had no tariff on file with the FCC because it is exempt from the filing requirement. Pet. 16; Pet. App. 12a -13a. Hence, the purposes behind the "filed rate" doctrine and the authorities discussing it "are thus not applicable." Pet. App. 13a. As a result, AT&T is off-base in its assertion that "state and federal decisions involving Section 332 preemption are all over the map." Pet. 15.

A. There is No Conflict Among the State High Courts that Deception Claims Are Not Preempted

State courts, and for that matter lower federal courts, are uniform in holding that claims relating to advertising and failures to disclose are not preempted. *See, e.g., Sanderson,*

Thompson, Ratledge & Zimny v. AWACS, Inc., 958 F. Supp. 947, 955 (D. Del. 1997); *Kellerman v. MCI Telecomms. Corp.*, 493 N.E.2d 1045, 1051-52 (Ill.), *cert. denied*, 479 U.S. 949 (1986); *Bennett v. Alltel Mobile Comm. Of Alabama, Inc.*, Civil Action No. 96-D-232-N, slip op. at 9 (M.D. Ala. May 14, 1996) (Res. App. A-1), *adopted in full by Moulton v. Alltel Mobile Comm. of Alabama, Inc.*, CA No. 96-D-89-N, slip op. (M.D. Ala. Aug. 16, 1996) (Res. App. B-18); *In re Long Distance Telecomms. Litig.*, 831 F.2d 627, 633-34 (6th Cir. 1987); *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541, 550 (D.N.J. 1996).

Kellerman illustrates that holdings from the highest state courts are in accord with the Washington Supreme Court. In *Kellerman*, MCI, much like AT&T here, contended that plaintiffs were not *really* challenging deceptive advertising but rather were seeking to regulate rates. *Kellerman*, 493 N.E.2d at 1051. Like the Washington Supreme Court, however, the Illinois Supreme Court rejected the argument. As the court noted, "[t]he subject matter of plaintiffs' complaints involves neither the quality of defendant's service nor the reasonableness and lawfulness of its rates." *Id.* Hence, just like the Washington Supreme Court, the Illinois Supreme Court found that the issue was deceptive advertising and not "rate regulation":

> [P]laintiffs seek to hold defendant to the same standards as they would any other business

> which advertises on a nationwide basis and which, in the course of its business, is subject to regulation from a number of Federal and State agencies. . . . The prosecution of these claims will in no way interfere with the delivery of long-distance telephone service to defendant's customers . . . . Finally, no Federal statute or regulation has been brought to our attention which would expressly prohibit these actions.

Id. at 1051-52. No amount of sophistry can change the fact that the case law does not support defendants conflict argument. *Kellerman*, and the other cases cited above, are in accord with the Washington Supreme Court opinion.

B. AT&T's Review of Intermediate Court Decisions Do Not Present a Conflict of Sufficient Magnitude to Warrant Review

In light of consistent state and federal authority, AT&T was forced to rely on one or two page slip opinions to illustrate its alleged "conflict." However, these cases, with little to no analysis, are not high court or circuit court of appeals opinions and do not support the assertions made throughout AT&T's brief. No amount of verbal acrobatics can change that fact.

Typical is AT&T's citation to *Simons v. GTE Mobilnet, Inc.*, No. H-95-5169 (S.D. Tex. Apr. 11, 1996), Pet.

15. *Simons* had nothing to do with fraud or deception because such a claim was not asserted. Rather, the plaintiffs claimed that one of GTE's service charges, a termination fee, though plainly disclosed in GTE's service contract, was itself illegal. Pet. 58a-59a. Hence, the *Simons* plaintiff's claim attacked the legality of a rate, and the Court found that such claims are preempted by the FCA. Unlike *Simons*, this case concerns deceptive advertising, and not "rate regulation."

AT&T's reliance on *Ball v. GTE Mobilnet of California, Ltd.*, No. 98AS03811 (Cal. Super. Ct. (Sacramento Cty.) Nov. 17, 1998), is similarly flawed. Pet. App. 63a-64a. The court in *Ball* analogized the case before it to that of *In re Comcast Cellular Telecomms. Litig.*, 949 F. Supp. 1193, 1205-06 (E.D. Pa. 1996). Plaintiffs in both cases "attacked the fairness of charges for non communication time." Not surprisingly, "[t]he court considered this to be more than just a challenge to billing practices (not necessarily preempted) and noted that plaintiffs were attacking the 'reasonableness of the method by which Comcast calculates length and consequently the cost of a . . . call.'" Pet. App. 64a. Hence, "'plaintiff' [sic] claims present a direct challenge to the calculation of rates . . . ." *Id.* Here, unlike *Ball*, there is no challenge to the calculation of the rate but rather, to the failure to disclose the calculation and to the failure to live up to AT&T's promises as set forth in advertising and by the terms of its contract.

AT&T's citations to the trial court decision in *Rogers v. Westel-Indianapolis Co.*, No. 49D03-9602-CP-0295 (Marion Super. Ct. (Ind.) July 1, 1996) (Pet. App. 65a-66a) and *Powers v. AirTouch Cellular*, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997) (Pet. App. 68a-69a) are equally misplaced. Indeed, *Rogers*, is little more than a minute order which identifies nothing about the grounds for its rulings. In *Powers*, after examining plaintiff's allegations, the court merely concluded that the complaint did "not focus on defendant's alleged failure to disclose . . . but on the legality or reasonableness of such charges." Pet. App. 69a.

Finally, AT&T cites to *Carroll v. Cellco Partnership*, Docket Nos. AM-001316-96T3 and AM-001303-96T3 (N.J. Super. Ct., App. Div., June 25, 1997) (Pet. App. 70a-71a) to support its "confusion" argument. However, *Carroll* is in accord with the plethora of cases cited above. Indeed, the *Carroll* court stated it was "satisfied that plaintiffs' action is primarily grounded on allegations of fraud and consumer protection and not rate setting." Pet. App. 70a-71a. It then ruled that "rates will not be directly impacted" because the respective trial judges would "recognize the limits of jurisdiction as reserved to the States under the 'savings clause' . . . ." *Id.* In other words, the court ruled that the claims were preserved to the extent they assert state-law deceptive-advertising and contract claims – a finding completely in accord with the cases cited above. Hence, as

the Court can see, AT&T's cries of conflict are illusory at best.[6]

Finally, determined to manufacture confusion, AT&T also asserts that regulatory agencies are in disagreement as to the scope of Section 332. In support, it cites to *Nova Cellular West, Inc. v. Air Touch Cellular of San Diego*, Case No. 98-02-036 (CPUC Sept. 3, 1998)(Pet. App. 72a-80a). However, *Nova* did not involve a violation of state consumer protection laws but rather whether AirTouch was required to provide Nova with promotional access and airtime plans available to them at lower rates. Pet. App. 73a. As the Commission noted, "[i]n this case, mandating that AirTouch provide particular services at given rates is functionally identical to requiring AirTouch to provide its given services at particular rates." *Id.* at 78a. Hence, *Nova* is a case about the lawfulness of rates. The Commission was never confronted with, and

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[6] AT&T attempts to point the finger at the "filed tariff" doctrine for the source of "the confusion among the lower courts." Pet. 16. However, the "filed tariff" rule is clear: it "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory agency." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). Unlike preemption analysis, the filed tariff doctrine does not determine which law governs the plaintiffs claim for fraud against telephone service providers. Rather, as AT&T acknowledges, it can *prohibit altogether* defrauded consumers from bringing any such claims anywhere when the provider has been required to file its rates with a regulating agency. This is because "[e]ven if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff." *AT&T v. Central Office Tel., Inc.*, 118 S. Ct. 1956, *3 (1998).

therefore never addressed, the issue of state consumer protection laws, such as those forbidding deceptive advertising. In light of this, the finding in *Nova* is not adverse to that in *Westside Cellular, Inc. v. GTE Mobilnet, Inc.*, 1995 Ohio PUC LEXIS 240 (Mar. 23, 1995). Pet. 17. Indeed, as *Westside* points out, "the legislature intended for the states to retain significant authority over cellular telephone to ensure a competitive marketplace and to safeguard the public interest." *Id.* at *9.

C. If a Conflict Exists it is at Such a Nascent Stage that Review is Premature

Supreme Court Rule 10 sets forth that review on writ of certiorari "is not a matter of right, but of judicial discretion." As stated in the rule, a petition will only be granted for "compelling reasons." *Id.* While not an exhaustive list, Rule 10 does set forth three reasons it deems compelling. One such reason is that "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Rule 10(b). It would appear that it is this compelling reason on which AT&T bases its request for review.[7] Yet, AT&T itself concedes that it is

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[7] Rule 10(b) appears to be implicated for AT&T states that "[t]he Washington Supreme Court's decision starkly illustrates the confusion in state and federal courts. . . ." Pet. 18. In addition, to Rule 10(b) it appears AT&T also seeks review pursuant to Rule 10(c) which sets for that review is appropriate where "a state court

"the *lower courts* and federal and state regulatory agencies that are divided," Pet. 18 (emphasis supplied), and not state courts of last resort as set forth in the rule. In light of AT&T's concession, its petition presents no "compelling reason" for Supreme Court review.

It would simply be premature for the Supreme Court to rule in this area when, as AT&T itself admits, it is only *lower* courts that are grappling with the issue. There are few if any circuit court rulings on these issues and only two high state court decisions, one of which forms the basis of this appeal and the other of which is completely in accord. Moreover, time may further illuminate how other high state courts and/or circuit courts will address the issue. *See generally, Rice v Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). Hence, this case does not present the type of "compelling reason" contemplated by Supreme Court Rule 10 and the holdings of the Supreme Court.

. . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). However, this compelling reason, like the one discussed above, is also not substantiated by case law. *See* discussion Section II, *infra*.

II.

THE WASHINGTON SUPREME COURT OPINION IS HARMONIOUS WITH PRIOR OPINIONS OF THIS COURT, AND OTHERS, THAT AN AWARD OF DAMAGES DOES NOT EQUAL IMPERMISSIBLE RATE REGULATION[8]

A. The Washington Supreme Court Decision Is Harmonious With Supreme Court Precedent

As a further basis for review, AT&T claims that the decision below conflicts with this Court's holdings. Analysis demonstrates that this is incorrect.

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[8] In as much as AT&T challenges the assessment of damages as opposed to the viability of the claim – its request for certification is premature. Defendants contention is that refunding damages equals retroactive rate regulation. Pet. 22. In *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), the Court was faced with a petition for review on the issue of whether a state statute regarding punitive damages governed the potential recovery on federal claims. The Court denied review determining that it had no authority to hear the appeal. Among the reasons set forth was that the outcome of the further proceedings on remand may render the question moot. Indeed, if the state law claims were ultimately lost on the merits, the issue of damages would be rendered moot. If not, the issues of damages would be addressed at that time. In light of those facts, the Court determined that the Alabama Supreme Court decision was not a "final" judgment worthy of certification. *Jefferson* is strikingly similar to the case before this Court. AT&T's contention that refund damages are retroactive rate setting need not be addressed at this time and could be rendered moot should respondents lose on other issues on remand. In light of this fact, and the holding in *Jefferson*, it is not at all clear that this case is even a final judgment worthy of review.

The Washington Supreme Court found that a request for money damages does not require a court to retroactively establish new rates. Pet. App. 31a. This finding was based in large part on the fact that respondents do not contend that they were injured by AT&T's act of charging for a full minute when the party merely spoke for seconds. Rather, respondents claim damage from AT&T's failure to disclose the practice and its breach of promise to bill "SEND TO END," and *not* from the practice itself. As the Washington Supreme Court so eloquently stated, this case does not challenge rates and an award of damages based on rates does not equal state regulation of rates:

> There is sufficient reliable authority for this Court to conclude that the state law claims brought by Appellants and the damages they seek do not implicate rate regulation prohibited by Section 332 of the FCA. The award of damages is not per se rate regulation, and as the United States Supreme Court has observed, does not require a court to "substitute its judgement for the agency's on the reasonableness of a rate." Any court is competent to determine an award of damages. [Pet. App. 25a-26a].

Despite this supported finding, AT&T claims that the Washington Supreme Court decision conflicts with the

findings of this Court in *AT&T Co. v. Central Office Tel. Inc.*, 118 S.Ct. 1956 (1998). Pet. 20-21. AT&T is wrong. In *Central Office* the Court held that "the century-old 'filed-rate doctrine' associated with the ICA tariff provisions applies to the Communications Act as well." *Id.* at *15. In *Central Office*, unlike the present situation, the carrier was required to file its rates and tariffs with the FCC. *Id.* Indeed, the Communication Act requires that the "filed tariff [must] show not only the 'charges' but also 'the classifications, practices and regulations affecting such charges,' 47 U.S.C. § 203(a) . . . ." *Id.* at *18. Under the "filed tariff" doctrine, the Court found that the "Communications Act's filed-tariff requirements pre-empt respondent's state law claims." *Id.* at *3. However, as stated throughout this opposition, filed tariff cases are wholly distinguishable. Moreover, here, unlike in *Central Office*, there is no challenge to the practice of billing increments as a practice, only to the failure to disclose those increments.[9] Because *Central Office* never discusses Section 332 or its explicit allowance of state law claims, it is wholly inapposite.

The *lack of conflict with Supreme Court* authority is

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[9] In *Central Office*, the state law claims before the Court were breach of contract and tortious interference with contractual relations. *Ia.* at *11. As the concurring opinion noted, "Respondent contends that petitioner promised to provide it with services on terms different from those listed in the tariff. As the above cases make clear, the filed rate doctrine bars such a claim." *Id.* at *28 (Rehnquist, C.J., concurring).

evidenced by *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). The Court in *Nader* allowed state law claims to proceed because, like here, the court was "not called upon to substitute its judgment for the agency's on the reasonableness of a rate." Pet. App. 24a-25a.[10] In the end, this Court in *Nader* determined that "the action 'does not turn on a determination of the reasonableness of a challenged practice,' but only on the issue of disclosure of that practice, 'the standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts.'" App. Pet. 25a.[11] Not only does AT&T fail to distinguish the harmonious ruling in *Nader* in the analytical portion of its petition – it does not even mention it at all. The

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[10] In *Nader*, an airline passenger was denied his reserved and confirmed seat on an airplane because the airline had overbooked the flight. Rather than accept the "denied boarding compensation" the passenger brought a common law action for fraudulent misrepresentation based on the airline's failure to disclose its boarding practices. Pet. App. 23a. Like the respondents here, the passengers were not challenging the practice only the airlines failure to disclose said practice. *Id.* The district court found for plaintiffs but the United States court of appeals reversed holding that the Civil Aeronautics Board was the body charged with determining the reasonableness of the booking practices. *Id.* The Supreme Court reversed. Pet. App. 24a. While focusing mainly on primary jurisdiction grounds, the Court did note that, unlike the case relied on by the Court of Appeals, here "there was no tariff provision requirement that airlines engage in or disclose the practice of overbooking." Pet. App. 25a. Hence, any impact on rates, "would be merely incidental." *Id.*

[11] As the Washington Supreme Court noted, "AT&T [did] not dispute that billing and advertising practices are *not governed exclusively* by the FCA, if at all." Pet. App. 25a (emphasis supplied).

omission is clearly purposeful. *Nader* specifically held that "any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental." *Id.* 300. The Washington Supreme Court opinion is consistent with *Nader*.

Similar authorities abound whose holdings are in unison with Supreme Court authority and the Washington Supreme Court decision. In *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541, 550 (D.N.J. 1996), for example, the court found that plaintiffs' claims for nondisclosure of rounding did not require a court to assess the reasonableness of the defendant's underlying billing practice. *Id.* Likewise, in *Kellerman v. MCI Telecomms. Corp.*, 493 N.E.2d 1045, 1051-52 (Ill.), *cert. denied*, 479 U.S. 949 (1986), the court ruled that an award of damages would not interfere with MCI's rates nor any other aspect of the FCA's regulatory scheme. *Id.* at 1051. Hence, the court rejected the premise that awarding damages was an act of rate regulation. The courts in *Bennett v. Alltel Mobile Comm. Of Alabama, Inc.*, Civil Action No. 96-D-232-N, slip op. at 9 (M.D. Ala. May 14, 1996) (Res. App. A-1) and *Moultan v. Alltel Mobile Comm. Of Alabama, Inc.*, CA No. 96-D-89-N, slip op. (M.D. Ala. Aug. 16, 1996) (Res. App. B-18) also rejected AT&T's argument and ruled that plaintiffs' claims for damages were immaterial to the issue of preemption: "The court finds that the relief sought in the form of a refund in the difference between the amounts

charged and the amount consumers allegedly though they were being charged . . . does not relate to the rates charged or services provided . . . ." *Bennett*, slip op at 6, Res. App. A-7. Finally, in *American Inmate Phone Sys., Inc. v. U.S. Sprint Comms. Co.*, 787 F. Supp. 852 (N.D. Ill. 1992), the court concluded that the request for breach of contract damages "neither conflicts with the provisions of the Communications Act nor interfere with the regulatory scheme of the Act." *Id.* at 856.

In short, AT&T's predicate is false: Legal damages are not rates, and courts can award damages without regulating rates or otherwise interfering with a federal regulatory regime. An award of damages against AT&T for deceiving customers will leave AT&T's rates untouched, i.e., it will not impose obligations on AT&T that are inconsistent with any prior decisions of this Court.[12]

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[12] AT&T asserts that the Washington Supreme Court holding "conflicts with decisions by other courts, which have concluded that similar claims for damages constitute state rate regulation" and cites to *Simons* and *Powers* to support this proposition. Pet. 22. However, this proposition is simply false. Not only did *Simons* and *Powers* not even address the issue of damages but *Powers* suggests that had the allegations in the complaint focused on "[d]efendant's alleged failure to disclose the 'teardown time' charge, [rather than] the legality or reasonableness of such charges" the claims would have been allowed to proceed. Pet. App. 69a.

B. The Washington Supreme Court Holding Is In Accord With Numerous Other Holdings that Damages Are Not *Per Se* Regulation

To further support its claim of conflict, AT&T cites to *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), in conjunction with Black's Law Dictionary, to press upon this Court that "damage awards unquestionably *can* constitute a form of state rate regulation." Pet. 21 (emphasis original). Based on this, AT&T contends that the Washington Supreme Court opinion is in conflict with Supreme Court authority. Pet. 22. However, as set forth below, the Washington Supreme Court holding on this issue *is not adverse* to Supreme Court authority.

The *Garmon* Court stated that "[r]egardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purpose." *Id.* at 244. However, here, respondents are attempting to punish AT&T for engaging in a deceptive practice – something which is *not the subject of national regulation*. Hence, there is no fear of "frustration of the national purpose," because Section 322 explicitly allows States to enforce consumer protection laws. Hence, *Garmon* is distinguishable from the case before this Court. In fact, dispositive on this issue, and in accord with the Washington Supreme Court's finding, is *Silkwood v. Kerr-McGee Corp.*,

464 U.S. 238 (1984). Like AT&T, the petitioners in *Silkwood* were unable to point to any legislative history or anything in the regulation that indicates that damages for violation of state laws are prohibited. *See id.* at 255. And, although allowance of damages may cause tension, the Supreme Court noted that such tension does not equate to a wholesale bar of damage awards:

> It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it so does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.

Id. at 256. By including the "terms and conditions" clause in Section 332 and by not delineating how states were to deal with violations of laws in areas which Congress has preserved their right to regulate, Congress made clear that an award of damages here resulting from a violation of consumer protection laws does not equal impermissible rate regulation. As a result, there is no conflict and no "compelling reason" to grant review.

C. The Washington Supreme Court Opinion Follows The Proper Standards Governing Preemption

There is a strong presumption against preemption in areas of traditional state regulation. *See New York State Conf.*

of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995);[13] *see also Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992).[14] The area of consumer protection is that traditionally regulated by the State. It is for this reason that consumer protection laws are often listed as part of the "terms and conditions" that *are exempt from Section 332*. In light of the strong state interest in protecting the welfare of its citizens and in enforcing its state consumer protection laws, it is hard to believe that AT&T would question the standards applied by the Washington Supreme Court.

AT&T contends that "nowhere in its decision below does the court mention . . . the critical role played by the statutory language." Pet. 23. This statement is wholly false.

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[13] The Court in *Travelers* stated: "[W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. . . . Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 654-55 (citations omitted)

[14] The *Cipollone* Court held that the federal law regulating cigarette warnings and labeling would not preempt state law claims based upon express warranty, intentional fraud and misrepresentation, or conspiracy. *Id.* at 530-31. The Court determined that whether federal law is preemptive depends upon Congress' intent. *Id.* at 516. *Accord*, *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) (Federal Motor Vehicle Safety standards did not preempt state-law product-liability cases alleging defective design for failure to require anti-lock brakes on tractor-trailers).

The court below focused on the critical role of the "terms and conditions" language which preserves state law causes of action for deceptive advertising.[15] Based on this statutory language, the court determined that Congress did not intend to remove states entirely from the wireless telephone industry. Had Congress intended to completely preempt state law causes of action, it most assuredly would not have included a clause which *explicitly provides for state regulation.*

Additionally, if the intent was to preempt all state law causes of action, Congress would not have included a savings clause.[16] Indeed, the Supreme Court has consistently found that savings clauses are further support against preemption. *See e.g., American Airlines v. Wolens,* 513 U.S. 219, 232 (1995). In *Wolens*, the Court was presented with a claim for violation of the consumer protection act as well as a claim for breach of contract. American Airlines contended that the claims were preempted by the Airline Deregulation Act, 49 U.S.C. § 41713, which prohibits state regulation of a price, route, or service offered by an air carrier. As stated by the Court, it was not "plausible that Congress meant to channel into federal courts the business of resolving, pursuant to

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[15] *See supra*, n.2.

[16] *See* 47 U.S.C. § 414 (1994) ("Nothing in this chapter . . . shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.").

judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or service." *Id.* In addition, "the conclusion that the ADA permits state-law-based court adjudication of routine breach-of-contract claims also makes sense of Congress' retention of the FAA's savings clause." *Id.* Hence, the ADA's preemption clause "read together with the FAA savings clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves" that an airline has acted negligently with respect to other areas. *See generally id.*

As the Washington Supreme Court found, the same holds true here. The FCA's preemption provision read together with the savings clause, stops states from imposing standards on "the entry of or rates charged by any commercial mobile service" but does not prohibit regulation of the "other terms and conditions of commercial mobile services" such as deceptive advertising. *See generally* Pet. App. 31a. This reasoning of the Washington Supreme Court is harmonious with Supreme Court precedent and numerous other courts which have addressed this issue. There is no conflict and, therefore, no reason to grant review.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT

FILED
MAY 14 1996
CLERK
U. S. DISTRICT COURT
MIDDLE DIST. OF ALA.

ROBBYN VAN BENNETT, etc.,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO.
ALLTELL MOBILE	)	96-D-232-N
COMMUNICATIONS OF	)	
ALABAMA, INC.,	)	
Defendant.	)	
	)	

MEMORANDUM OPINION AND ORDER

Before the court is the plaintiff's motion, filed February 28, 1996, to remand this action to the Circuit of Lowndes County, Alabama, whence it was removed. The defendant responded in opposition on March 19, 1996.

In the three-count complaint, the plaintiff avers that in connection with the billing for cellular phone service, defendant Alltel, through its agents and employees, misrepresented and failed to disclose its practice of charging for a full minute of cellular phone air time even if a subscriber

is connected for only a few seconds. The plaintiff also contends that Alltel has breached its contract with the plaintiff because Alltel's contract fails to notify the user of the phone service of its practice of rounding up the amount of air time used to the next full minute. Subsequently, the defendant removed this action, asserting federal-question jurisdiction pursuant. to 28 U.S.C. §§ 1331 and 1441.[1] The defendant contends that the plaintiff's claim for relief involves the application of the communications Act, 47 U.S.C. §§ 151 et seq., and the Omnibus Budget Reconciliation Act of 1993 ("OBRA"), which amended the Communications Act to expressly preempt any action by a state to regulate the rates charged by cellular service providers. In essence, the defendant contends that while the plaintiff has not pleaded a violation of the Communications Act or the OBRA, these Acts still control in this action. The plaintiff asserts, however, that he is seeking relief only under state law, thus, precluding removal based upon federal-question jurisdiction.

Because removal jurisdiction raises significant

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[1]Section 1441 states in part that ". . . any civil action brought in a State court of which district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . ." 28 U.S.C. § 1441(a). Pursuant to 28 U.S.C. § 1331, a district court has original jurisdiction over all cases "arising under the Constitution, laws or treaties of the United States."

federalism concerns, the removal statutes must be strictly construed. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941). All doubts must be resolved in favor of a remand to state court. Stone v. Williams, 792 F. Supp. 749 (M.D. Ala. 1992); Lambert v. Mail Handlers Benefit Plan, 886 F. Supp. 830, 833 (M.D. Ala. 1995) (Albritton, J.) (remand of a removed case is favored where federal jurisdiction is not absolutely clear) (citing Burns v. Windsor Ins. 31 F.3d 1092, 1095 (11th Cir. 1994)); see also Horn v. Rural Community Insurance Servs., 903 F. Supp. 1502, 1504 (M.D. Ala. 1995) (Albritton, J.); Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941). Moreover, "the existence of a federal question cannot be left to mere speculation." Bryant v. Blue Cross & Blue Shield of Alabama, 751 F. Supp. 968, 969 (N.D. Ala. 1990) (citations omitted). As such, the defendant, as the party removing this action to federal court, has the burden of establishing federal jurisdiction. Sullivan v. First Affiliated Secs., 813 F.2d 1368 (9th Cir.), cert. denied, 484 U.S. 850 (1987).

The foregoing is consistent with the basic principle that federal courts are courts of limited jurisdiction and have the power to hear only those cases which congress or the Constitution authorizes them to hear. Lambert, 886 F. Supp. at 832 (citations omitted); Horn, 903 F. Supp. at 1504 (citing Gulf Offshore, 453 U.S. at 477-78). Accordingly, "a presumption (exists) that state courts have concurrent jurisdiction over claims that involve federal law." Id.

Whether the complaint states a federal question must be determined by examining the face of the complaint. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-11 (1983). As stated by the Supreme Court of the United States:

> [o]nly state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal-question jurisdiction is required. The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. See Gully v. First National Bank, 299 U.S. 109, 112-13 . . . (1936). The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987) (internal footnotes omitted); Great Northern R.R. Co. v. Alexander 246 U.S. 276, 282 (1918) ("[T]he plaintiff may by the allegations of his [or her] complaint determine the status with respect to the removability of a case."); The Fair v. Kohler Die & Specialty Co. 228 U.S. 22, 25 (1913) (The

plaintiff is "master to decide what law he [or she] will rely upon."); Burke v. Humana Ins.. Co., No. 95-T-299-N, No. 95-T-300-N, slip op. at 4 (M.D. Ala. May 11, 1995) (A plaintiff "has the prerogative to rely on state law alone although both state and federal law may give him (or her] a cause of action."). In other words, "lower federal courts [have] jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." Franchise Tax Bd., 463 U.S. at 27-28. The Supreme Court has narrowly construed the test to restrict removal by holding that simply because a claim implicates a federal issue, or involves construction of federal law does not necessarily give rise to a federal question and confer removal jurisdiction on a federal court. Merrill Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986).

Here, the original complaint neither mentions the Communications Act, as amended, nor invokes any other federal statute. Moreover, it does not mention a constitutional provision or a treaty. Hence, the complaint does not refer to any matter which allows access to a federal court under § 1331.

In making this determination, the court rejects the defendant's argument that the plaintiff's complaint necessarily implicates the filed rate doctrine which raises a federal

question. See Def.'s Opp. to Remand at 18-20. Specifically , the court finds that the defendant's reliance on T&G Express, Inc. v. Webster Indus., 93-D-1127-N, slip op. at 3 (Jan. 12, 1994) (DeMent, J.) (attach. as Ex. G), is misplaced. In T&G Express, this court did state that "[w]hen the tariff of a common carrier is challenged or recovery is predicated on the existence of a valid tariff, the case involves a federal question under 28 U.S.C. § 1331, which may be removed to federal court from a state court upon a filing of a notice of removal pursuant to § 1446 by the defendant." T&G Express, slip op. at 3. However, T&G Express is distinguishable from the instant case because the T&G Express plaintiff asserted a tariff claim, in addition to contract claims, which was the basis for removal. Thus, in T&G Express, the face of the complaint set forth a federal claim. The court interprets T&G Express as merely holding that when recovery is specifically predicated on the existence of a valid tariff as a specific count in the plaintiff's complaint, then the issue is one of federal law. In this case, on the other hand, the plaintiff predicates recovery solely on common law contract grounds. The tariff issue is raised as a defense by the defendant. Consequently, because the plaintiff is the master of his or her complaint, the court finds that T&G Express does not support the existence of removal jurisdiction in the instant case.

In addition, the court does not believe that the plaintiff's right to relief necessarily depends on a resolution of a substantial question of federal law, in that federal law is a

necessary element of one of the well-pleaded claims. The court finds that the relief sought in the form of a refund in the difference between the amounts charged and amount consumers allegedly thought they were being charged does not confer the court with federal-question jurisdiction in that it does not relate to the rates charged or services provided, particularly when a commonsense reading of the complaint reflects the pleading of state law claims. The causes of action are, supported by alternative theories of state law, and the Communications Act, as amended, is not essential to any of those theories. The alternative theories of state law include breach of contract, fraud, misrepresentation, suppression of material facts, and engaging in deceptive practices. These are state law claims the determination of which must be left to the state court system. Moreover, retaining jurisdiction over this action would interfere with a state court's right to decide and interpret its own law as applied to the federal acts of this case. Accordingly, the court finds that the causes of action do not arise under federal law.[2]

The court recognizes that the preemptive force of some federal statutes can provide a legal basis for removal of a case from state to federal court even if a plaintiff has framed the complaint to allege violations of only state law.

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[2]The court notes that it is not persuaded by the defendant's "artful pleading" argument. Here, the plaintiff has not merely failed to plead federal questions, but rather, the substance of the plaintiff's complaint involves state law.

Metropolitan Life Ins.. Co. v. Taylor, 481 U. S. 58, 65 (1987). For example, the Supreme Court of the United States has determined that issues involving the Labor Management Relations Act, 29 U.S.C. § 1001, et seq., and the Employment Retirement Income Security Act, 29 U.S.C. § 185, et seq., transform state-law claims into ones arising under federal law for purposes of the well-pleaded complaint rule. Caterpillar, Inc., 482 U.S. at 393-94.

In determining whether complete preemption exists, the court focuses on congressional intent. Lambert, 886 F. Supp. at 836. The court is highly persuaded by Justice Brennan's concurrence in Metropolitan Life, wherein he stated: "In future cases involving other statutes, the prudent course for a federal court that does not find a clear congressional intent to create removal jurisdiction will be to remand the case to state court." Metropolitan Life, 481 U.S. at 68 (Brennan, J., concurring) (quoted in Lambert, 886 F. Supp. at 837). Thus, as stated in Horn v. Rural Community Ins.. Servs., 903 F. Supp. 1502 (M.D. Ala. 1995) (Albritton, J.), "[a]bsent a finding of clear Congressional intent to preempt the state courts from hearing the actions, the court must presume that complete preemption does not apply. Id. at 1504.

The defendant first relies on 47 U.S.C. § 332(c)(3)(A), as amended by OBRA, to support a finding of complete preemption under the Communications Act, as amended. Section 332 (c) (3) (A) states in pertinent part:

"Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rate charged by any commercial mobile service. . . ." 47 U.S.C. § 332(c)(3)(A). In comparison with the language of ERISA, the court finds that § 332(c)(3)(A) is not as broad in scope. See Lambert, 886 F. Supp. at 836 (similar finding involving the Federal Employees Health Benefits Act). As set forth above, the Communications Act, as amended, expressly provides for preemption only where state law regulates "the entry of or the rates charged by . . . commercial mobile service" providers, such as Alltel. 47 U.S.C. § 332(c) (3) (A). On the other hand, "ERISA's preemption clause states that the law 'shall supersede any and all state laws insofar as they may now or hereafter relate to an employee benefit plan.'" Lambert, 886 F. Supp. at 836 (discussing ERISA's jurisdictional and preemption clause) (emphasis added).

Clearly, Congress could have completely preempted state law by stating that § 332 (c) (3) (A) would preempt any state law that related to the rates charged by commercial mobile service providers, if it so desired. However, Congress chose to only prohibit the regulation of those rates by the states. In fact, § 332 (c) (3) (A) does not seek to vindicate the same interests upon which the plaintiff's state cause of action seeks relief. See Bryant, 751 F. Supp. at 972 (citing Allstate Ins.. v. 65 Security Plan, 879 F.2d 90, 93 (3d Cir. 1989)) (stating requirement for complete preemption includes

vindication of same interests). Here, the plaintiff is not contesting the rate charged, but rather is challenging Alltel's failure to disclose in its contract with consumers its practice of "rounding up" charges for air time. Hence, this action will not affect the rates charged; instead, it may, depending on the outcome, affect the disclosure of the rates charged. In other words, there is not a federal remedy directed to the matter of disclosing the basis behind the rate charged. Given that jurisdiction is not directly conferred by a cause of action concerning cellular services, the court finds that the preemptive force in § 332 (c) (3) (A) is not so powerful as to displace entirely any state cause of action within the ambit of the federal cause of action.

The defendant also points the court to §§ 47 U.S.C. 201(b) and 207 to suggest that the complete preemption doctrine applies to the Communications Act, as amended, thereby rendering any claim federal in nature.[3] Section 201(b) provides that any "charge, practice, classification or regulation that is unjust or unreasonable is declared to be unlawful. . . ." 47 U.S.C. § 201(b). Section 207 vests exclusive jurisdiction over claims arising under § 201(b) in either the federal courts or the Federal Communications Commission:

> Any person claiming to be damaged by any common carrier subject to the provisions of

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[3]OBRA did not amend either § 201(b) or § 207.

> this chapter may either make complaint to the Commission . . . or may bring suit for the recovery of the damages in any district court of the United States. . . .

47 U.S.C. § 207.

In In re Long Distance Telecommunications Litigation, 831 F.2d 627 (6th Cir. 1987), the Sixth Circuit remanded a case similar to the instant case. Therein, the plaintiffs' fraud claims were based on the defendants' failure to disclose their practice of charging long distance customers for uncompleted calls, ring time and holding time. The Sixth Circuit held that the plaintiffs' state law claims for fraud and deceit, based on the defendants' alleged failure to notify customers of the practice of charging for uncompleted calls, were not preempted:

> We believe the district court erred in holding that the state law claims for fraud and deceit, based on the defendants' failure to notify customers of the practice of charging for uncompleted calls, were pre-empted by the Communications Act. These claims, unlike those based on Section 201 of the Act, do not require agency expertise for their treatment and are "within the conventional experience of judges."

831 F.2d at 633-34 (citing Far East Conference v. United States, 342 U.S. 570, 574 (1952)) (emphasis added).

In In re Long Distance Telecommunication ions Litigation, the court also distinguished Ivy Broadcasting Co. v. American Telephone & Telegraph Co., 391 F.2d 486 (2d Cir. 1968), relied on by the defendant in this case. The Sixth Circuit distinguished Ivy Broadcasting as follows:

> [In Ivy Broadcasting,]. . . the complaint charged negligence and breach of contract in the rendition of interstate telephone service. The Ivy court held that the claims were preempted by federal common law even though they did not charge violations of specific provisions of the Communications Act. However, the alleged torts involved the level of service provided by the defendants, not a failure to notify customers of a practice [as in this case].

Id, at 634. The court finds, contrary to the defendant's assertion and consistent with the court's discussion of § 332(c) (3) (A), that § 332 (c) (3) (A) does not alter the analysis or holding in Ivy Broadcasting. Moreover, as discussed supra, the court finds, similar to the Ivy Broadcasting court, that a commonsense reading of the complaint in this case suggests that the state law claims relate to the failure to disclose rather than rates or service.

More importantly, though, §§ 201(b) and 207 must be read in conjunction with the savings clause in § 414, which

states in pertinent part:

> [n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

47 U.S.C. § 414 (emphasis added). The court finds that it logically follows from this savings clause that the Communications Act, as amended, did not preempt the entire field of commercial mobile services. See Hudson Ins.. Company v. American Electric Corp., 748 F. Supp. 837, 844 (M.D. Fla. 1990) (similar finding concerning the comprehensive Environmental Response Compensation and Liability Act of 1980), aff'd, 957 F.2d 826, cert. denied, 506 U.S. 955 (1992). In other words, the court finds that the savings clause indicates a lack of intent by Congress to extend the Communications Act, as amended, to all matters somehow related to those known to be preempted. Based on the foregoing, the court concludes that nothing in the Communications Act, as amended, gives the explicit suggestion necessary to infer that Congress intended to rely on a body of federal common law to interpret all actions involving commercial mobile services.[4] Cf. Hudson Ins.. Co.

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[4]In making this determination, the court rejects the defendant's argument that Sprint Corp. v. Evans, 818 F. Supp. 1447 (M.D. Ala. 1993) (Albritton, J.) lends support to the proposition that the Communications Act completely preempts the entire field

v. American Electric Corp., 748 F. Supp. 837, 843 n.5 (M.D. Fla. 1990) (reaching same conclusion regarding the Comprehensive Environmental Response Compensation and Liability Act of 1980); National Audubon Soc. v. Department of Water, 869 F.2d 11964 1201-03 (9th Cir. 1988) (reaching same conclusion regarding Clean Water Act).

If the court were to find otherwise, it would be allowing federal common law to implement precisely that which Congress determined was not necessary. Moreover, this case does not involve unique federal interests; rather, allowing a state court to hear this contract and fraud dispute between private parties will not frustrate federal policy. In fact, given that Congress enacted the savings clause, it obviously thought state courts could adequately handle matters in this area. As such, the court emphasizes that it "will not broaden the language of [any federal] statute without some clear indication from Congress that this was [its] intent." Horn, 903 F. Supp. at 1505 (citing Hyzer v. Cigna Property & Cas. Ins., Co., 884 F. Supp. 1146, 1151 (E.D. Mich. 1995)).

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of mobile commercial services. The court reads Sprint as completely preempting the field of interstate message transmissions. Here, though, the plaintiff is not attempting to regulate interstate message transmissions; rather, he is merely questioning a mobile service provider's disclosure policy to consumers. While the causes of action in this case may very well be preempted by a federal statute, the whole field is not preempted to constitute complete preemption.

The court finds that absent "complete preemption" of state causes of action, the defendant cannot establish that a federal court has original jurisdiction by arguing preemption as a defense:

> Ordinarily, federal pre-emption is raised as a defense to the allegations in a plaintiff's complaint. Before 1887, a federal defense such as pre-emption could provide a basis for removal, but, in that year, Congress amended the removal statute. We interpret that amendment to authorize removal only where original federal jurisdiction exists. Thus, it is now settled law that a case may not be removed to federal court on the basis, of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

Caterpillar Inc., 482 U.S. at 393-94 (internal citations omitted) (emphasis in original). The court notes that its ruling on "complete preemption has no preclusive effect on the state court's consideration of the substantive preemption defense." Bryant, 751 F. Supp. at 973 (quoting Whiteman v. Raley's, Inc. 886 F.2d 1177, 1180-81 (9th Cir. 1989)) (internal quotations omitted). In fact, the court has no jurisdiction to rule on the substantive preemption defense

because complete preemption is lacking. Id. "Th[e] court has no doubt that the Alabama state courts are perfectly capable of correctly applying the preemption defense. . . . Horn, 903 F. Supp. at 1506.

CONCLUSION

Because the plaintiff's complaint only involves state law claims and does not involve a substantial question of federal law, because the complete preemption doctrine does not convert the plaintiffs' state claims into claims under the Communications Act, as amended, and because a defendant may not remove a case based upon a federal preemption defense, the court finds that the defendants have failed to establish that at the complaint pleads a federal question. Thus, the court does not have original jurisdiction over this action.

Accordingly, it is CONSIDERED and ORDERED that the plaintiff's motion to remand be and the same is hereby GRANTED and this cause be and the same is hereby REMANDED to the Circuit Court of Lowndes County, Alabama. The clerk is DIRECTED to take all steps necessary to effect said remand.

DONE this */s/ 14th* day of May, 1996.

/s/ Jan DeMent

UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FILED
AUG 16 1996
CLERK
U.S. DISTRICT COURT
MIDDLE DIST OF ALABAMA

ROBERT MOULTON, III	)	
on behalf himself and all	)	
others similarly situated	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO.
ALLTELL MOBILE	)	96-D-89-N
COMMUNICATIONS OF	)	
ALABAMA, INC.,	)	
Defendant.	)	

ORDER

Before the court is defendant's request for a ruling on the plaintiff's motion to remand filed August 12, 1996, which the court construes as to include a motion to reconsider the decision of the clerk to close this case based on the plaintiff's notice of dismissal filed on June 20, 1996. For good cause shown, it is CONSIDERED and ORDERED:

(1) That the defendant's motion for reconsideration be and the same is hereby GRANTED because pursuant to Rule

23 (e) of the *Federal Rules of Civil Procedure* a plaintiff must obtain the court's approval of a dismissal of any potential class action as well as provide notice to all class members of such a dismissal.

(2) That this action be and the same is hereby REINSTATED.

(3) That pursuant to the authority of Robbyn Van Bennett, et al. v. Alltel Mobile Communications of Alabama, Inc., Civil Action No. 96-D-232-N (M.D. Ala. May 14, 1996) (DeMent, J.) (A copy of the order is attached hereto.) and 28 U.S.C. §1447(c), the plaintiff's motion to remand be and the same is hereby GRANTED and that this cause be and the same is hereby REMANDED to the Circuit Court of Montgomery County, Alabama. The clerk is DIRECTED to take all steps necessary to effectuate paid remand.

DONE this */s/ 16th* day of August, 1996.

/s/ Jan DeMent

UNITED STATES DISTRICT JUDGE

APPENDIX C

SUPERIOR COURT
OF THE
STATE OF WASHINGTON
FOR KING COUNTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MICHAEL LAIR and DAVE MANWEILER, individually and on behalf of all others similarly situated, Plaintiffs, vs. U.S. WEST NEW VECTOR GROUP d/b/a U. S. WEST CELLULAR Defendant.	NO. 95-2-26309-7-SEA

This Notice May Affect Your Rights.
Please Read It Carefully.

TO: ALL SUBSCRIBERS OF U. S. WEST NEWVECTOR WHO PARTICIPATED ON A PAYING BASIS IN A FULL-MINUTE CELLULAR CALLING PLAN AT ANY TIME DURING THE PERIOD JULY 1, 1994 THROUGH MAY 1, 1996, EXCEPT FOR (A) SUBSCRIBERS WITH TALKALONG℠ CALLING PLANS OR CALLING PLANS OFFERED TO CALIFORNIA SUBSCRIBERS, OR (B) SUBSCRIBERS WHOSE

ACCOUNTS WERE TERMINATED BY NEWVECTOR FOR NON-PAYMENT

INTRODUCTION

1. This Notice is given pursuant to an order of the Superior Court of Washington for King County. The purpose of this Notice is to inform you of the pendency of a class action and the proposed settlement of a class action that is pending on your behalf against U.S. WEST NewVector Group d/b/a U.S. West Cellular ("NewVector"), and to inform you how this lawsuit and the settlement may affect your rights and what steps you may take in relation to it. This Notice is not an expression of any opinion by the Court as to the merits of the claims or defenses by any of the parties to this class action.

DESCRIPTION OF THE CASE

2. Michael Lair and Dave Manweiler are the persons bringing this lawsuit (the "Plaintiffs"). Plaintiffs' claim relates to NewVector's method of billing cellular air time. For certain subscribers, NewVector rounds air time for billing purposes, to the next highest minute. This is also called "rounding up" or full-minute billing. For example, a call that lasts one minute and five seconds is rounded up to two minutes for billing and air time calculation purposes. This case is about whether this method of billing was adequately disclosed and was otherwise appropriate.

PLAINTIFFS' CONTENTIONS

3. The complaint alleges that NewVector offers customers a range of billing plans in each of its service areas. These plans offer a fixed-charge per month for a specified period of air time, (*e.g.*, thirty, sixty, seventy-five or two hundred minutes). For any air time beyond the fixed-charge time allotted under each plan, the subscriber is charged at various rates "per minute," depending on the plan and whether the call is made during peak or off-peak hours.

4. Plaintiffs allege that the plain import of the language describing these plans is that a customer receives a set amount of air time.

5. Once a customer has selected the billing plan, NewVector requires that each customer sign a Service Agreement which identifies the plan selected. Plaintiffs contend that these Service Agreements contain all of the terms and conditions of the customers' agreement with NewVector. Plaintiffs contend that missing from the billing terms is the fact that NewVector rounds up air time to the next highest full minute.

6. Plaintiffs contend that NewVector's "rounding" practice is not fully disclosed or referenced in NewVector's point of sale documents, *i.e.*, brochures and rate plans.

7. Plaintiffs contend that rounding up air time damages Settlement Class Members by preventing customers from receiving the specified fixed-charge air time under their

plans. For example, if a plan provides thirty minutes of air time, a customer may actually be on the air for less than thirty minutes but might begin paying on a per-minute basis due to rounding up.

8. In their complaint Plaintiffs allege that NewVector's method of billing constitutes a violation of the Washington State Consumer Protection Act (and/or other consumer protection statutes in other states), negligent misrepresentation, common law fraud and a breach of contract. Plaintiffs seek monetary damages for the injury caused to class members, treble damages under the Washington Consumer Protection Act, and costs of the suit including attorneys' fees.

DEFENDANT'S CONTENTIONS

9. NewVector denies all allegations of wrongdoing and liability. As explained more fully herein, NewVector contends that full-minute billing was fully disclosed in NewVector's advertising brochures, bills, service agreements and by information available to consumers in the marketplace and was legally permissible and appropriate. NewVector also contends that its advertising and sale of cellular service were not the cause of damages to consumers, since NewVector changed its billing plans in response to consumer feedback and lowered rates to provide additional savings to subscribers. Further, even if subscribers were

unaware of NewVector's advertising brochures and the standard industry method of full-minute billing, the method of billing would have been fully disclosed by the first bill, representing one of numerous ways in which potential damages would be limited.

CLASS CERTIFICATION

10. For the purposes of Settlement, NewVector has stipulated to a Settlement Class. A "class" is a legal mechanism whereby one or more individuals can represent all those who are similarly situated with respect to defendant's alleged conduct.

11. The Settlement Class consists of the following members: All subscribers of U. S. WEST NewVector who participated on a paying basis in a full-minute cellular calling plan at any time during the period July 1, 1994 through May 1, 1996 (the "Settlement Class Period"), except for (a) subscribers with TalkAlong℠ calling plans or calling plans offered to California subscribers, or (b) subscribers whose accounts were terminated by NewVector for non-payment (an "involuntary deactivation").

Your receipt of this notice, therefore, does not necessarily mean that you are a class member. You are a class member only if you fit within the class definition set out above.

TERMS OF THE SETTLEMENT

12. Class Counsel have thoroughly investigated the facts and applicable law regarding the claims of the persons on whose behalf they are acting and potential defenses thereto. Based on this, Plaintiffs and Class Counsel believe that the proposed settlement set forth below is fair, reasonable and adequate, and in the best interests of the Settlement Class. Class Counsel also conducted extensive negotiations with counsel for NewVector prior to arriving at this settlement, taking into account the relevant facts and law. The following description of the proposed settlement is only a summary, and reference is made to the text of the Stipulation of Settlement, on file with the Court, for a full statement of its provisions:

(a) NewVector will fully and fairly disclose "rounding up" or full-minute billing in contracts, service agreements and all point-of-sale collateral documents, when it is occurring.

(b) NewVector acknowledges that in response to this litigation, it has already changed some or all of its disclosures regarding full-minute billing.

(c) NewVector will compensate members of the Settlement Class according to i) a member's average monthly cellular usage during the Settlement Class Period (measured in terms of minutes of usage or "MOUs") and ii) whether the member is an active NewVector subscriber, or

whether the member's cellular service was terminated voluntarily by the member, or involuntarily by NewVector:

SETTLEMENT AWARDS

Customer Usage	**Groupings**
Highest	>250 MOU/Month
High	150-250 MOU/Month
Medium	60-150 MOU/Month
Low	<60 MOU/Month

Settlement Awards -- ACTIVE SUBSCRIBERS (*i.e.*, current customers)

Bill Credit (Highest Usage)	$26
Bill Credit (High Usage)	$18
Bill Credit (Medium Usage)	$ 9
Bill Credit (Low Usage)	$ 3

Settlement Awards -- VOLUNTARY DEACTIVATION (meaning you elected to terminate your services, *i.e.*, you are a former customer).

Bill Credit or cash (Highest Usage)	$26
Bill Credit or cash (High Usage)	$18
Bill Credit or cash (Medium Usage)	$ 9
Bill Credit or cash (Low Usage)	$ 3

(d) Former subscribers whose cellular

service was terminated by NewVector for nonpayment (i.e., involuntary deactivations) are not included within the Settlement Class.

(e) Each Settlement Class Member is entitled only to one settlement award. The average monthly cellular usage and resulting settlement award for Settlement Class Members with more than one qualifying cellular line of service will be calculated using an average of the applicable MOUs for all qualifying lines of service. Active Settlement Class Members who also have one or more separate voluntarily deactivated lines of service will receive their settlement award as an Active Subscriber. Settlement Class Members with more than one voluntarily deactivated line of service, and no active line of service, will be eligible to reactivate one cellular line of service.

(f) The value of the consideration set forth above is estimated to be approximately $8.4 million. NewVector's total obligation may vary with the final accounting, but the value for each class member remains the same.

(g) NewVector will pay all notice and administration costs, including but not limited to the costs of printed and published notice, publication of summary notice, identification of class members, and calculation and payment of claims.

(h) If a Settlement Class Member within the voluntary deactivation category reactivates with

NewVector and elects the bill credit option, that class member i) has the right to waiver of the activation fee, and ii) can opt for a month-to-month contract if reactivation is with his or her own phone. If NewVector supplies the cellular phone, then a standard twelve-month service agreement is required.

(i) In exchange, if the Settlement is approved, the Court will enter a final judgment dismissing this action with prejudice, and dismissing with prejudice all claims, demands, and causes of action against NewVector, its subsidiaries, affiliates, agents, predecessors, successors and assigns, as their respective representatives, that were or could have been asserted by Plaintiffs and the Settlement Class Members who do not elect to exclude themselves from the class and its benefits arising out of the facts and circumstances alleged in this action. If the proposed settlement is approved, all members of the Settlement Class who do not elect to exclude themselves from the class and its benefits will be personally barred and enjoined from instituting or prosecuting, indirectly or directly any and all actions or proceedings that they had or have, known or unknown, arising out of or based upon the facts set forth in the Complaint. All members of the Settlement Class who do not elect to exclude themselves from the class, whether or not they file a claim form, will be bound by the terms of the settlement and releases of claims and any order of the Court dismissing the litigation

16. Plaintiffs took into account all of the foregoing

factors in agreeing to the proposed settlement. Although Plaintiffs believe they would have overcome these defenses, there is no certainty that this, in fact, would occur.

HOW CLAIMS WILL BE PROCESSED

17. Accompanying this Notice is a Proof of Claim and Release ("Proof of Claim") which must be filled out in order to take part in the settlement. Settlement Class Members must indicate a) whether they are active or former subscribers as of the date they mail the Proof of Claim, and b) if they are former subscribers, whether they elect to reactivate or receive a cash award. The Proof of Claim must be mailed on or before October 20, 1997 to: NewVector Claims Administration, P.O. Box 4068; Portland, OR 97208-4068. All claims will be administered within 120 days of the final approval of the Settlement by the Court.

ELECTION BY CLASS MEMBERS

18. If you are a member of the class, you have a right to elect whether or not to exercise your right to exclude yourself from the class. Your choice will have certain consequences that you should understand before making this decision.

IF YOU WISH TO REMAIN IN THE CLASS, YOU

NEED NOT RESPOND TO THIS NOTICE IN ORDER TO DO SO BUT YOU SHOULD FILL OUT A CLAIM FORM.

IF YOU DO NOT WISH TO REMAIN IN THE CLASS, YOU MUST RESPOND TO THIS NOTICE.

CONSEQUENCES OF EXCLUSION FROM THE CLASS

19. If you do not wish to remain a member of the class, you must request to be excluded. If you request exclusion, you will not be entitled to share in the settlement. However, if excluded, you may present any claims you have against NewVector by filing your own lawsuit.

20. If you do not wish to remain a member of the class, you must mail a written request for exclusion, postmarked no later than August 18, 1997, to: Steve W. Berman, Hagens & Berman, 1301 Fifth Avenue, Suite 2929, Seattle, WA 98101 and Barry Kaplan, Perkins Coie, 1201 Third Avenue, 40th Floor, Seattle, WA 98101.

21. Requests for exclusion must refer to Lair v. U.S. West NewVector, No. 95-2-26309-7 SEA and must provide your name and address. For the sake of convenience, please also provide your current or former NewVector cellular account numbers. All requests for exclusion must be signed

and expressly state that you wish exclusion from the class.

THE HEARING

22. A hearing (the "Settlement Hearing") will be held before the Honorable R. Joseph Wesley at 8:30 a.m. on August 25, 1997, in Room W905 of the Superior Court of the State of Washington for King County, at 516 Third Avenue, Seattle, WA, for the purpose of determining whether the proposed Settlement is fair, reasonable and adequate and whether it should be approved by the Court; whether judgment should be entered dismissing the actions on the merits and with prejudice as against Defendant. The Settlement Hearing may be continued or adjourned from time to time by the Court at the Settlement Hearing or any continued or adjourned session thereof without further notice.

23. Settlement Class Counsel will apply to the Court at the conclusion of the Settlement Hearing for an award of attomeys' fees and costs of $1,686,000, which represents approximately 20% of the monetary value of the Settlement. This amount will be paid by NewVector in addition to the previously described amounts being offered to the Settlement Class. Plaintiffs will also seek approval of payments to the two plaintiffs of $10,000 each, as payment for the time and expense in prosecuting this case on behalf of the Settlement Class.

24. Any member of the Settlement Class who has not requested exclusion may appear at the Settlement Hearing to show cause why the proposed Settlement should not be approved, the Class Action should not be dismissed on the merits with prejudice as against the Defendant, and to present any opposition to the application of Settlement Class Counsel for attorneys' fees, costs and expenses, or to the application for an award to the plaintiffs, provided, however, that no such person shall be heard, unless his or her objection or opposition is made in writing and is filed, together with copies of all other papers and briefs to be submitted by him or her to the Court at the Settlement Hearing, with the Court no later than ten days prior to the hearing, and showing due proof of service on:

Settlement Class Counsel:

Steve W. Berman
Hagens & Berman
1301 Fifth Avenue, Suite 2929
Seattle, WA 98101

and Counsel for Defendant:

Barry Kaplan
Perkins Coie
1201 Third Avenue, 40th Floor
Seattle, WA 98101-3099

Unless otherwise ordered by the Court, any member of the Settlement Class who does not make his or her objection or

opposition in the manner provided shall be deemed to have waived all objections and opposition to the fairness, reasonableness and adequacy of the proposed settlement, or to the request of Settlement Class Counsel for attorneys' fees, costs and expenses,

ADDITIONAL INFORMATION

25. This notice is not all-inclusive. Any questions you have concerning the matters contained in this notice (and any corrections or changes of name or address) should not be made to the Court but should be directed in writing to Settlement Class Counsel at the address listed below.

26. If you wish to communicate with Settlement Class Counsel as your attorney in this litigation, you may do so by writing to Steve W. Berman at the firm of Hagens & Berman, P.S., 1301 Fifth Avenue., Suite 2929, Seattle, WA 98101.

Please do not contact the court for further information at this time.

DATED: July 8,1997.

SUPREME COURT, U.S.
FILED
JAN 21 1999
CLERK

No. 98-947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AT&T WIRELESS SERVICES and MCCAW CELLULAR COMMUNICATIONS, INC.,

Petitioners,

v.

CORYELLE TENORE, CHARLES F. PETERSON and KAREN M. COLE, on behalf of themselves and all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the Washington Supreme Court

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REPLY BRIEF OF PETITIONERS

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January 21, 1999

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TABLE OF AUTHORITIES

CASES

AT&T Co. v. *Central Office Tel., Inc.*,
118 S. Ct. 1956 (1998) 10

American Airlines, Inc. v. *Wolens*,
513 U.S. 219 (1995) 7,9

Ball v. *GTE Mobilnet, Inc.*,
No. 98AS03811 (Cal. Super. Ct. (Sacramento County)
Nov. 17, 1998) 5

Bennett v. *Alltel Mobile Communications*,
C.A. No. 96-D-232-N (M.D. Ala. May 14, 1996) 3

Cox Broad. Corp., v. *Cohn*,
420 U.S. 469 (1975) 8

Crandon v. *United States*,
494 U.S. 152 (1990) 7

EEOC v. *Arabian American Oil Co.*,
499 U.S. 244 (1991) 7

Hardy v. *Claircom Communications Group, Inc.*,
937 P.2d 1128 (Wash. App. 1997) 3

Jefferson v. *City of Tarrant, Ala.*,
118 S. Ct. 481 (1997) 8

Kellerman v. *MCI Telecomms. Corp.*,
493 N.E.2d 1045 (Ill. 1986) 6

Laing v. *United States*,
423 U.S. 161 (1976) 7

Lividas v. *Bradshaw*,
512 U.S. 107 (1994) 7

In re Long Distance Telecomms. Litig.,
831 F.2d 627 (6th Cir. 1987) 6

Morales v. *Trans World Airlines, Inc.*,
504 U.S. 374 (1992) 7,9

Nader v. *Allegheny Airlines, Inc.*,
426 U.S. 290 (1976) 6,9

Simons v. *GTE Mobilnet, Inc.*,
No. H-95-5169 (S.D. Tex. Apr. 11, 1996) 5

United States v. *Standard Oil Co.*,
332 U.S. 301 (1947) 7

STATUTES & LEGISLATIVE HISTORY

Omnibus Budget Reconciliation Act of 1993,
Pub. L. No. 103-66, 107 Stat. 312 6

47 U.S.C. § 332(c)(3)(A) ..... *passim*

H.R. Rep. No. 103-111, *reprinted in* 1993 U.S.C.C.A.N.
378 7

RULE

Sup. Ct. R. 10(c) 7

REPLY BRIEF OF PETITIONERS

In the petition, AT&T Wireless Services, Inc. and McCaw Cellular Communications, Inc. (jointly, "AT&T Wireless") demonstrated that review by this Court was necessary and appropriate because: 1) resolution of the issue of the preemptive scope of 47 U.S.C. § 332(c)(3)(A) ("Section 332") is critical to Congress' goal of fostering development of the wireless industry by creating a uniform national regulatory environment free from State regulation of "rates charged" -- a goal imperiled by scores of class action lawsuits predicated on state law claims seeking hundreds of millions of dollars in the form of rate refunds; 2) there is wide-spread conflict and confusion among the federal and state courts and agencies regarding the preemptive scope of Section 332; and 3) the Washington Supreme Court's decision conflicts with decisions by this Court regarding the scope of the term "rates," whether refund damages constitute rate regulation, and the proper standards for resolving the scope of an express preemption provision such as Section 332.

Respondents' Brief in Opposition ("Resp. Br.") does not undermine this showing. Most critically, respondents fail to address the principle reason that review should be granted: resolution of the preclusive effect of Section 332 is an issue of critical importance to scores of similar class action lawsuits throughout the country involving virtually every major wireless provider and tens of millions of wireless customers. Because they cannot dispute the importance of the issue presented, respondents insist that the need for review is neither "urgent" nor "compelling," and argue, on the merits, that the issue presented does not "jeopardiz[e]" the wireless industry because the rate rebates they seek somehow are *not* inconsistent with Section 332's prohibition of state regulation of wireless "rates." Resp. Br. 6-7, 16. Further, respondents erroneously contend

both that there is "no confusion [or] controversy among courts," *id.* at 8, *and* that the confusion and controversy are not "of sufficient magnitude" to warrant this Court's attention, *id.* at 11. Indeed, in their zeal to create the false impression of uniformity among the courts, respondents argue that the decision below regarding the scope of Section 332 is in accord with other decisions that *predated* the enactment of Section 332. *Id.* at 9-11.

The preemptive scope of Section 332 is an issue of exceeding national importance that has engendered conflict and confusion among the state and federal courts and agencies. The Washington Supreme Court's decision presents an ideal vehicle for this Court to resolve that conflict.

1. At the outset, it is important to refocus the inquiry on the central issue of whether damages in the form of rate refunds (or rate "rebate[s]," as respondents now prefer, Resp. Br. 7) predicated on state law constitute rate regulation prohibited by Section 332. Respondents attempt to distract attention from this inquiry by peppering their brief with inflammatory rhetoric alleging that their lawsuit seeks to require AT&T Wireless "to bill customers as promised," "to charge the rate it promised," and to require "businesses to tell the truth about billing and/or keep contractual promises." Resp. Br. 7. As the Washington Supreme Court explained, and AT&T Wireless noted in the petition, respondents did not challenge the dismissal of their breach of contract claims, Pet. 11 n.12; Pet. App. 4a n.13, and therefore this case has nothing to do with baseless claims that AT&T Wireless failed to satisfy its contractual obligations.

Instead, this case squarely presents the issue whether an award of damages in the form of a rate refund amounts to state regulation of "rates charged" that is preempted by Section 332. On this point, respondents insist that their claims do not seek to

"change, diminish, or modify the rates being charged by AT&T," and that they "d[o] not seek any relief that would disturb the uniformity of rates charged by AT&T." Resp. Br. 3. These blanket assurances, however, are directly refuted by their Complaint, which expressly seeks "compensatory damages in the form of *a refund of the difference between the amounts charged by [AT&T Wireless] and the amount, if any, which cellular users would have incurred* if [AT&T Wireless] did not engage in this practice." Pet. App. 37a.[1] (emphasis added). To award respondents the "refund" damages they seek, a court would have to impose retroactively a new rate, with a new rate increment replacing the full-minute increment adopted by AT&T Wireless. It defies logic to contend that retroactive adoption of a new rate does not "change, diminish, or modify" the rates charged by AT&T Wireless. Resp. Br. 3.

To argue otherwise, respondents embrace the tortured logic of a district court decision, which, if anything, confirms the incoherence of their theory:

> "The court finds that the relief sought in the form of a refund in the difference between the amounts charged and the amount consumers allegedly though[t] they were being charged . . . does not relate to the rates charged or services provided . . . ."

Id. at 21-22 (quoting *Bennett* v. *Alltel Mobile Comm.*, C.A. No. 96-D-232-N, slip op. at 9 (M.D. Ala. May 14, 1996)). Under respondents' view -- *i.e.*, States are free to regulate "rates" so long as they do so retroactively -- Section 332's prohibition against State rate regulation would be rendered meaningless.

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[1] Respondents do not appear to dispute that their claim for injunctive relief is moot. Resp. Br. 6; *see Hardy* v. *Claircom Communications Group*, 937 P.2d 1128, 1132 n.3 (Wash. App. 1997) (holding similar claims to be moot).

2. The preemptive scope of Section 332 is an issue of profound and widespread importance to the wireless industry and its customers. Respondents do not dispute that resolution of this issue could affect literally scores of similar class action cases pending throughout the country involving virtually every major wireless provider and tens of millions of wireless customers. Pet. App. 52a-57a (listing cases). Nor do they deny that, in the aggregate, these related lawsuits seek hundreds of millions of dollars in damages from wireless providers. Indeed, in this suit alone, respondents claim that AT&T Wireless is liable for "tens of millions of dollars" in damages. Resp. Br. 3.

Thus, respondents' claim that there is no "urgent" or "compelling" need for review is simply wrong, *id.* at 6, 16, and it rings particularly hollow in light of their arguments to the Washington Supreme Court. To secure discretionary review below, respondents argued that this case presented a "'fundamental and urgent issue of broad public import which requires prompt and ultimate determination'" because it "w[ould] impact hundreds of thousands of telephone consumers across the country." *Tenore* v. *AT&T Wireless Services*, Statement of Grounds for Direct Review, 6 (Wash. July 31, 1997) (copy lodged with the Clerk of the Court). As respondents further acknowledged, this case is "one of dozens of similar lawsuits filed . . . in state courts across the country" and a "ruling on this appeal" would "influence pending related litigation everywhere." *Id.* at 1. Respondents cannot seriously contend that the issue presented was "'fundamental and urgent,'" *id.* at 6, before the court below, but that there is "nothing novel or urgent arising" from the same issue now that it is presented to this Court, Resp. Br. 7.

Nor does the single class action settlement identified by respondents support the conclusion that these lawsuits present no impediment to Congress' efforts to ensure uniformity of regulation of the wireless industry. *Id.* at 7. Far from

undermining the importance of review, this $8.4 million settlement confirms both that the damages sought in these numerous cases are substantial and that respondents' "rebate" theory of liability directly implicates the rates charged by wireless providers. Resp. App. C-25 (tying individual settlement awards to monthly minutes of usage).[2] Indeed, the fact that one of the many pending class actions settled for such an exorbitant amount highlights that, in the aggregate, these scores of pending cases present a substantial threat to Congress' efforts to ensure uniform national regulation of the wireless industry by divesting States of "any authority" to regulate "rates." 47 U.S.C. § 332(c)(3)(A).

3. The core of respondents' argument against review consists of two points. *First*, they argue, incorrectly, that "[t]here is no confusion and controversy among the courts -- the decisions are uniform." Resp. Br. 8. *Second*, they contend that the "holdings from the highest state courts are in accord with the Washington Supreme Court." Resp. Br. 10. These claims do not withstand scrutiny.

First, respondents cannot seriously deny that state and federal courts and agencies have reached conflicting conclusions regarding the preemptive scope of Section 332. Pet. 15-19. In *Simons* v. *GTE Mobilnet, Inc.*, No. H-95-5169 (S.D. Tex. Apr. 11, 1996), for example, the Texas court expressly held that "all state law claims related to the field of rate regulation are completely preempted by section 332(c)(3)(A)." Pet. App. 62a (Texas law defining "unreasonable practices" preempted by Section 332). Similarly, in *Ball* v. *GTE Mobilnet, Inc.*, No. 98AS03811 (Cal. Super. Ct. (Sacramento County) Nov. 17, 1998), the California court flatly rejected plaintiffs' claim that

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[2] Under the terms of that settlement, class participants would receive a one-time payment or bill credit of between $3 and $26, Resp. App. C-25, while Settlement Class Counsel would receive $1,686,000, *id.* at C-30.

their challenge to the "nondisclosure" of "rounding up" was not preempted by federal law. Pet. App. 63a-64a. Finally, the lower court's decision here overruled a published decision by that State's Court of Appeals which preempted the same claims advanced by respondents in this case. *Id.* at 32a.

Second, respondents argue, based solely on the Illinois Supreme Court's decision in *Kellerman* v. *MCI Telecomms. Corp.*, 493 N.E.2d 1045 (Ill. 1986), that review should be denied because the "highest state courts are in accord" with the decision below. Resp. Br. 10-11. In *Kellerman*, a case decided 7 years before the enactment of Section 332, the court rejected a preemption challenge to state law claims because, among other things, "no Federal statute or regulation ha[d] been brought to [the court's] attention which would expressly prohibit these actions." 493 N.E.2d at 1052. Because Section 332 was enacted years later, see Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b), 107 Stat. 312, 394, it could not have been brought to the *Kellerman* Court's attention. Consequently, respondents have no support for their claim that the decision below "is in accord" with any decisions by the highest state courts. Resp. Br. 11.[3]

To be sure, respondents are correct that AT&T Wireless does not claim that this issue has generated a conflict among the federal courts of appeals or the highest state courts. *Id.* at 8,

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[3] For the same reason, respondents' reliance on *In re Long Distance Telecomms. Litig.*, 831 F.2d 627, 633-34 (6th Cir. 1987), as support for their claim of uniformity also is inappropriate. Indeed, it is telling that respondents rely most heavily on cases that predate the enactment of Section 332 and that do not involve an express preemption provision. *See* Resp. Br. 5-6, 9-11, 19-21) (relying on *Nader* v. *Allegheny Airlines*, 426 U.S. 290 (1976); *Kellerman*, 493 N.E.2d at 1045; *In re Long Distance*, 831 F.2d at 627). Essentially, their position must be that Congress' enactment of an express preemption provision such as Section 332 has no effect on a court's preemption analysis.

15-16. But they simply ignore the importance of timely resolution of this issue when they argue that review should be delayed until additional courts address Section 332's preemptive effect. *Id.* at 15-16. A conflict among the States' highest courts or the federal courts of appeals is not an absolute prerequisite to review by this Court. See Sup. Ct. R. 10(c) (authorizing review when "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court"). Indeed, the Court regularly grants review to address important issues of federal law.[4] Moreover, review is warranted where the same issue is presented in numerous cases pending in the lower courts, thereby counseling for a definitive ruling by this Court.[5]

Here, there can be no doubt that resolution by this Court of the proper scope of Section 332 is an important issue that will have a profound effect on an industry that Congress recognized was a vital component of the Nation's telecommunication's infrastructure. See H.R. Rep. No. 103-111, at 260, *reprinted in* 1993 U.S.C.C.A.N. 378, 587. It is undisputed that the same issue has arisen in scores of similar class action lawsuits affecting nearly every major wireless

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[4] *See, e.g.*, *American Airlines* v. *Wolens*, 513 U.S. 219, 226-27 (1995) (granting review to address question of federal preemption); *Lividas* v. *Bradshaw*, 512 U.S. 107, 116 (1994) (granting review to "address the important questions of federal labor law"); *Morales* v. *Trans World Airlines*, 504 U.S. 374, 378 (1992) (granting review to consider whether Airline Deregulation Act preempts state law claims); *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 247 (1991) (granting review to resolve important question of "statutory interpretation"); *Crandon* v. *United States*, 494 U.S. 152, 157 (1990) (granting certiorari to review construction of an "important statute").

[5] *See Laing* v. *United States*, 423 U.S. 161, 167 (1976) (noting conflict and granting review where "70 pending cases in the federal courts depended on [an issue's] resolution"); *United States* v. *Standard Oil Co.*, 332 U.S. 301, 302 & n.2 (1947) (issue presented affected hundreds of pending cases).

carrier and tens of millions of wireless customers, Pet. App. 52a-57a, and that final resolution of this issue would have an immediate and substantial impact on all of these cases. More critically, further delay in resolving the preemptive scope of Section 332 would permit a patchwork of conflicting decisions to frustrate Congress' efforts to ensure regulatory uniformity and certainty through its command that States have no authority to regulate wireless "rates." 47 U.S.C. § 332(c)(3)(A).[6]

4. Apart from the importance of the issue presented, review also is appropriate because the Washington Supreme Court's decision conflicts with decisions of this Court on important issues regarding federal preemption law.

Respondents disagree, arguing that there can be no such conflict because the "Washington Supreme Court [sic] opinion is consistent with [*Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976)]." Resp. Br. 21. Further, they allege that "[n]ot only d[id] AT&T fail to distinguish . . . *Nader* in the analytical portion of its petition -- it does not even mention it at all." *Id.* at 20. That is false. In the petition, AT&T Wireless explained that the Washington Supreme Court's reliance on *Nader* was

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[6] Respondents also suggest that this Court lacks jurisdiction because the federal issue "could be rendered moot should respondents lose on other issues on remand." Resp. Br. 17 n.8 (citing *Jefferson* v. *City of Tarrant, Ala.*, 118 S. Ct. 481 (1997)). As explained in the petition, the Washington Supreme Court's decision falls comfortably within the jurisdiction of this Court. Pet. 12 n.14 (citing cases). Unlike *Jefferson* -- a case in which reversal of the State Supreme Court's decision would affect only "two of the four counts in petitioners' complaint," 118 S. Ct. at 486 -- jurisdiction in this case is secure because the Washington Supreme Court squarely confronted the issue of preemption under Section 332; reversal of that decision will preclude further litigation in this case; and without immediate review, the decision below "might seriously erode federal policy" pertaining to a critical component of the national telecommunications infrastructure. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 483 (1975).

inappropriate because, "unlike this case" *Nader* "involved (1) a statutory scheme that lacked any express preemption provision and (2) a challenge to a practice for which the federal agency charged by Congress with regulatory authority over the practice expressly permitted individuals to advance state common-law claims." Pet. 11 (citations omitted).

More to the point, because *Nader* did not involve an express preemption provision, the *Nader* Court applied "conflict" preemption analysis. 426 U.S. at 299. As a result, the Washington Supreme Court's heavy reliance on the "conflict" preemption analysis in *Nader* is contrary to this Court's cases which employ very different standards when assessing the scope and effect of an *express* preemption provision. Indeed, after Congress added an express preemption provision to the statutory scheme at issue in *Nader*, this Court held that claims similar to respondents' were expressly preempted. See *American Airlines*, 513 U.S. at 226-27; *Morales*, 504 U.S. at 391. Here, the lower court's conclusion that respondents' claims for damages were not preempted even though they clearly would have an "impact on rates," Pet. App. 31, cannot be reconciled with the *express* language of Section 332, which divests States of "any authority to regulate . . . rates." 47 U.S.C. § 332(c)(3)(A).[7]

Nor can the lower court's crabbed interpretation of "rates" be reconciled with this Court's recent admonitions that

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[7] Respondents rely on *American Airlines* to argue that a general savings clause is "further support against preemption," Resp. Br. 26, but they omit that the Court in *American Airlines* struck down state common law and positive law claims despite the existence of a similar "savings clause." 513 U.S. at 228. Moreover, the issue here is whether the damages sought by respondents would require "rate" regulation prohibited by Section 332, not whether a party can challenge "the other terms and conditions of commercial services" unrelated to "rate" regulation. 47 U.S.C. § 332(c)(3)(A).

the term "rates" only has meaning "when one knows the services to which they are attached." *AT&T Co.* v. *Central Office Tel., Inc.*, 118 S. Ct. 1956, 1963 (1998). Respondents posit that *Central Office* and other cases contrary to the lower court's decision are "wholly distinguishable" because they involved the "filed tariff doctrine," Resp. Br. 19, but they fail to explain why the Court's interpretation of the term "rates" in a filed-tariff case should not also apply when assessing whether a claim for damages regulates "rates" under Section 332.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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